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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING CO., INC.,

Petitioner,

v.

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS and NATHANIEL TOLBERT.

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HURON STEVEDORING CORP.,

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v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE and WHITFIELD TOPPIN.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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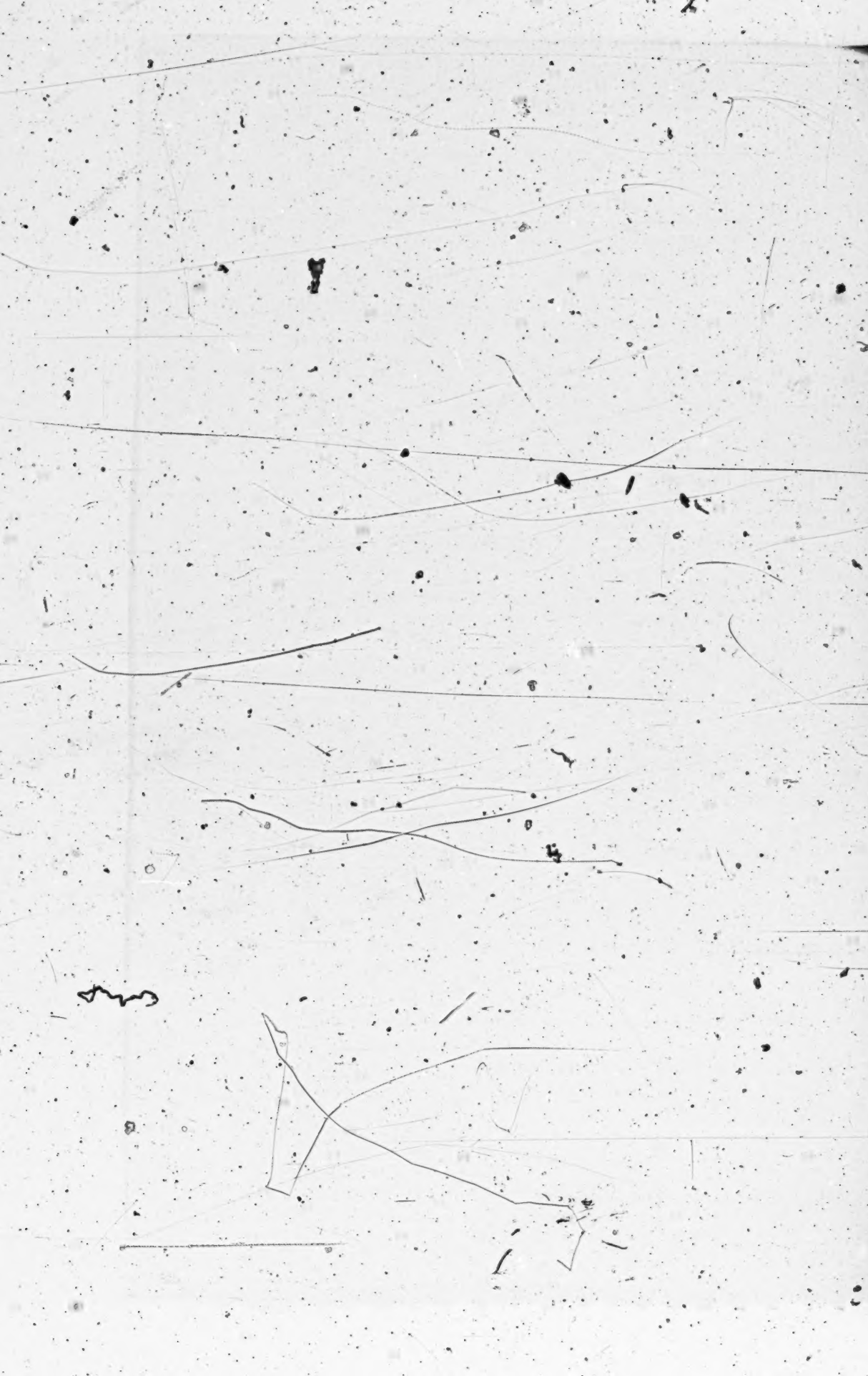

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 581-91) is reported at 69 F. Supp. 956. The opinion of the United

States Circuit Court of Appeals for the Second Circuit (R. 654-9) is reported at 162 F. (2d) 665. To its opinion the Circuit Court appended those findings of the District Court which it adopted as pertinent (R. 660-5).

Jurisdiction

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Nature of the Suits

These two actions, consolidated for purposes of trial (R. 17-8), were brought under Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Pub. 718, 75th Cong.; 52 Stat. 1060; 29 U. S. C. Sec. 201 et seq.), referred to here as "the Act", to recover unpaid overtime compensation, together with an additional equal amount as liquidated damages, the costs of the actions and reasonable attorneys' fees. The actions were originally instituted by several hundred longshoremen against two stevedoring contractors for whom they worked at various times between 1943 and 1945, Bay Ridge Operating Co. Inc. and Huron Stevedoring Corp., respectively, in behalf of themselves and other employees similarly situated (R. 4-14). By stipulation the class character of the actions was terminated and the caption amended to name as plaintiffs those who had elected prior to the trial to participate and be bound by the judgment (Pl. Exs. 1-4, R. 2a).

For purposes of simplifying trial and appeal procedure, the claims of ten claimants in each of the two actions were severed, as typical, from those of the other employees and tried separately (Pl. Exs. 5-6, R. 544-9). The other claims were left pending on the docket of the

lower court, to be controlled by the "legal rules and principles established by * * * final disposition of the severed actions" (R. 2-2a, 544-9, 592-3).[1]

Statutory Provision Involved

Section 7 (a) of the Act provides as follows:

> No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Question Presented

The essential issue here arises from the method of compensating longshoremen in the Port of New York, who load and discharge vessels moving in interstate and foreign commerce. Respondents were concededly within the coverage of the Act's overtime provisions in their employment by petitioners (find. 4-7, R. 593-4). The collective bargaining agreement between the International Longshoremen's Association, to which respondents belong, and the Deepwater Steamship Lines and Contracting

[1] The twenty claims selected for immediate trial were chosen as representing what was thought to be every possible combination of work pattern, with respect to the variety of the cargo handled, the capacity worked, and the distribution of working time between contract "straight time" and contract "overtime" periods. It is these twenty claims which were adjudicated by the trial court. It is difficult to understand why petitioners stipulated to abide by the determination of these claims if, as they now assert, the claims were atypical (cf. Pet. Br., p. 5, note 3, pp. 45-7).

Stevedores of the Port of New York, including petitioners, in effect from October 1, 1943 to September 30, 1945, set up what the Circuit Court has termed (R. 655) "two sets of hourly rates" for work performed on various types of cargoes. One set was designated in the contract by the term "straight time" and the other by the term "overtime" (find. 8-10, R. 594-7). The agreement further provided that:

> 3 (a) Straight time rate shall be paid for any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday.
>
> (b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rates.

For general cargo the "straight time" hourly rate was $1.25 and the "overtime" hourly rate was $1.875 or 150% of the "straight time" rate (find. 9, R. 595).[2]

Respondents performed 80% of their work during the so-called "overtime" hours at "overtime" rates. In fact, some of them were specifically hired to work at night and never worked at all during "straight time" hours or at "straight time" rates (find. 40, R. 613; Appendix, this brief).

Respondents have contended that the $1.875 is not an overtime payment, but only another and different rate of

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[2] The somewhat higher rates paid for "straight time" and "over time" or "all other time", respectively, in handling obnoxious or dangerous cargoes of specified types did not always bear the relation of 100 and 150%. Following the trial court's holding that Section 7 was violated in this respect, the parties agreed upon the amount of recovery. The same is true of the "heading" differentials which were added in an identical amount to both "straight time" and "overtime" rates, so that the latter were less than 150% of the former (opin., R. 591; find. 9-12, R. 594-8; concl. 4-5, R. 617-8). For practical purposes the discussion may thus be limited to the general cargo rates, since petitioners have indicated that they have no quarrel with this result (Pet. Br., pp. 6-7, notes 6-7).

pay for work performed at certain times of day or on certain days of the week. Under this theory, respondents have urged, the total wages paid at all rates, including so-called "overtime" rates, must be divided by total hours worked to obtain the individual employee's "regular rate of pay" for the first 40 hours in the week, and 50% of that rate must be applied additionally to the hours in excess of 40, to comply with Section 7 of the Act[3]. The trial judge recognized (R. 583) that:

> "There is a certain plausibility about plaintiff's case. For instance, in the case of an employee who worked only during the so-called "overtime" hours, it is true that he received compensation at no greater rate for the hours in excess of 40 than for the hours within 40. Such a result seems to fly in the face of the statute.

Nevertheless, the trial court concluded as a matter of law that "the 'regular rate', which is the statute's measuring rod," had been "contractually established by the parties at $1.25 an hour" for all purposes (R. 583; concl. 3, R. 617).

The Second Circuit reversed and unanimously accepted respondents' contention as consistent both with the guides previously established here and with the opinions of the Wage and Hour Administrator [162 F. (2d) 665]. The Circuit Court thus had no need to pass upon respondents' charge of error in the admission and exclusion of certain items of evidence.

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[3] Credit is concededly to be accorded in making this computation for the payments denominated "Wage and Hour Adjustment" here. Petitioners have failed to distinguish the payments of additional half-time compensation for Saturday morning work following forty straight time hours earlier the same week, payments not required under the contract, from contractual "overtime" (cf. Pet. Br., p. 23). In fact the former, as respondents concede, were true statutory overtime, paid on a weekly basis. See note 4, *infra*.

The issue is: was the contractual "straight time" rate the "regular rate of pay" at which respondents were employed? Or, put in another way, was compensation at the contract-designated "overtime" hourly rates payment at "not less than one and one-half times the regular rate of pay" at which these longshoremen were employed, as required under Section 7 of the Act?

The Trial and Nature of the Evidence.

The actions were tried without a jury on June 17, 20, 21, 24 and 25, 1946 (R. 2a). Respondents rested their *prima facie* case exclusively upon the introduction of stipulations relating to their employment and payment by the respective petitioners, together with schedules showing the various rates at which they were employed; the hours which they worked, and the total compensation they received for the various weeks during the period in question (R. 20-4; Pl. Exs. 7-8, R. 550-8). From these schedules it appears that their employment was virtually limited to the years 1943-1945. No claim is made for the period after September 30, 1945 (R. 471).

Data sampled from the original payroll material for one selected week within the period in suit indicated, in the case of Bay Ridge employees, the exact time of starting and stopping during each work stint performed by each of the selected plaintiffs in the action against that company (Pl. Ex. 8). In the Huron case the number of hours worked by each of the selected plaintiffs at different times of day and on different days of the week was indicated as well as the rates paid for different types of cargo handled (Pl. Ex. 7). The schedules showed that the various respondents were employed at several different rates of pay varying within a week, and, with the exception of one circumstance of rare occurrence, received no added compensation at the end of each workweek for

overtime actually worked in excess of 40 hours (Pl. Exs. 7-8).

An examination of respondents' employment record shows that their work followed no regular pattern. They worked varying numbers of days in different weeks. The number of hours worked on the days when they did work varied greatly. Many weeks they worked less than 40 hours; other weeks more than 40 hours. They handled a variety of cargoes, for which they were paid at varying rates; and some of them worked at various times as headers, gangwaymen, or assistant foremen during the hours designated in the collective agreement as "straight time" or "overtime", or both, indiscriminately. [Find. 21, R. 601; find. 41, R. 614.] During the period in suit the petitioners paid respondents the "straight time hourly rate" for work performed during the contract "straight time" hours and the "overtime hourly rate" for work performed during the contract "overtime" hours, plus the customary "heading" differentials. These rates were paid by the petitioners regardless of whether respondents worked more or less than 40 hours a week, with a single rare exception (find. 42, R. 614)* and regardless of whether they had actually worked in the "straight time" hours in the "basic working day" (Pet. Br., p. 14).

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*According to one of the stipulations covering Bay Ridge if, and only if, a plaintiff worked 40 hours between 8 a. m. and 12 noon and 1 p. m. and 5 p. m. Monday through Friday, inclusive, and then worked between 8 a.m. and 12 noon on Saturday of the week, he received additional compensation for work actually performed during the latter hours at 62½ cents per hour (Pl. Ex. 8, par. D, R. 557-8). There was an exception to this in the case of three plaintiffs in certain workweeks when they worked for Bay Ridge in New Haven, Conn. (R. 591; find. 43(a), R. 614-5) and there has been recovery therefor (find. 47, R. 616; concl. 4-5, R. 617-8). The testimony indicated that the practice of the Huron Company was to pay the additional under the particular circumstances (R. 269-70). However, the occasion for such payments was, obviously, rare. See schedules, Pl. Exs. 7-8. Such additional payments were designated by the company on its payroll records as a "Wage and Hour Adjustment" (R. 558).

Petitioners, in resisting recovery, rested primarily upon the terms of the collective bargaining agreement establishing chronological, or what we may term "clock hour", limitations upon a so-called "basic working day" and a higher rate of compensation, coinciding mathematically with the familiar 150% of the rate paid during the basic working day, for "all other time".[4a]

Petitioners were not content with the introduction of evidence relating to the various collective agreements going back through the years, the custom and understanding of "overtime" in the longshore industry, and the objectives and purposes of the contracting parties in consummating the 1943-1945 contract. Over respondents' objection that they were irrelevant, immaterial and not embraced within the issues they pressed the introduction of statistical analyses designed to show that the pattern of hours worked by longshoremen during the war years and in peacetime conditions, respectively, approached coincidence with the so-called "basic working day" established under the master contract (R. 28-30, 235-6; Def. Exs. D-F, J). These the trial court received and used as foundation for both decision and findings (opin. R. 590; find. 29, R. 606-8; find. 39, R. 612). Next, petitioners called upon expert witnesses to testify, as economic authorities, upon the concept of overtime as developed historically under collective agreements in American industry in general, and to express the view that the "overtime" paid on the "clock hour" basis under the longshore agreement was "true overtime" as "industrially understood". Their testimony was largely directed to establish that a higher rate for work at a particular time of day had to be either a shift differential or "over-

[4a] Petitioners have suddenly taken to the use of the phrase "specifically scheduled hours" to denote what the contract terms the "basic working day" (Pet. Br., pp. 2-3, 9, 19-22, 31, 34, 49-51, 69). These hours were not "scheduled" for anyone, and the trial court has found that no one worked them (find. 44-5, R. 598-9; find. 40-1, R. 612-4; find. 45, R. 615).

time", and that the appropriate test was the amount of spread between the basic rate and the higher rate. Respondents' objections that such testimony was irrelevant and immaterial, and that in any event it lacked probative force in view of the clear indication of prior defense testimony as to the *unique character* of employment relations in the longshore industry, were brushed aside (R. 325-6, 331-4, 337-8, 419-20, 425-7, 433-6, 438). The trial judge both received and relied upon this line of proof (opin. R. 589-90; find. 28, R. 604-6; find. 39, R. 612).

As to the first of the statistical surveys, he had preliminarily observed:

> "I will receive it for the narrow purposes which I have indicated. It is really brief material, rather than evidentiary material" (R. 29).

And the others were apparently received only "for the same limited purpose" (R. 29-30), that is, as brief data and "not evidence in the strict sense of the word" (R. 238-9). These surveys related to data compiled for the years 1923-7 and 1938-9 (Def. Exs. D-F), not contemporaneous with the period in suit except that the last, with which respondents were confronted for the first time upon the trial, covered 1944-5 data (R. 630-3, Def. Ex. J).

Being surprised by the presentation of the contemporaneous survey, respondents could not during the trial arrange for compilation of statistical data to meet its effect, but, as soon as the trial was completed, counsel prepared compilations from the rather limited data which petitioners had submitted in the form of records transcripts upon their examination before trial (R. 633). These statistics were made available as appendices to the brief respondents submitted to the lower court after the trial. Following the decision and judgment, respondents moved under Rule 59 (a) of the Federal Rules to open the record to admit this material, which they could not obtain in time for the trial,

and under Rule 52 (b) to make certain additional findings based thereon (motion, R. 623-4, 625-7; affid. R. 629-30, 633-4 and tables 1, 3 and 4, exs. B-1, B-2, B-3, R. 640-2). Petitioners interposed no answering affidavit, but appeared in opposition, and the court denied the motion (R. 643).

As to the expert testimony, the court had cautioned counsel in chambers that it was "strictly not testimony" (R. 438). Yet it was nevertheless received, with this observation:

> "I do not think he is testifying. I think he is arguing, and on the basis of the discussion I had with counsel in chambers I will allow it, by appointing him counsel *pro haec vice* or quasi-counsel" (R. 438).

Notwithstanding, the court denied admissibility to economic authorities presented by respondents in the form of statements in official publications of the United States Government characterizing the contractual "overtime" rate as a higher rate paid for particular hours of the day and days of the week and tending to refute the statistical and expert evidence submitted by the defense (R. 530-4; Pl. Exs. 15-17 for ident.). Defense counsel did not object to the photostatic form of the exhibits or to any failure of authentication, acknowledging the accuracy of the copies and the imprint, manifested by official seal, of the United States Government Printing Office (R. 532-4).

Further, it should be observed that the trial court accepted copies of letters written by the Wage and Hours Administrator, the Deputy Administrator and one of his Regional Directors, purporting to bear on interpretation of the Act under the circumstances at bar (R. 534-42; Pl. Exs. 18-19, R. 559-66; Def. Exs. N-O, R. 574-80). In this regard the court observed:

> "As a matter of fact, I don't think it needs to be offered in evidence but I will receive it. If this were published in one of the regular publications of the

Wage and Hour Administrator * * * it would be material which I could have access to * * *" (R. 537).

There was not available for offer at the trial in June, 1946 an important opinion of the Administrator's office issued May 7, 1946, but not distributed officially to the field staff until July (R. 635). Respondents also made this interpretation available as an appendix to the brief submitted to the trial judge. In the motion for a new trial following the decision and judgment, they included a request that the record be reopened to receive this opinion (motion, R. 623-4; affid. R. 629-32 and ex. A, R. 635-9). Nevertheless, the court, without explanation, denied the motion (R. 643). And in fact, while giving weight to the personal views of Mr. Ryan, Prof. Taft and Dr. McCabe on the question at bar (R. 172, 337-8, 438, 583, 590) Judge Rifkind lend no consideration whatever, in either the opinion or the findings, to the interpretations of the Wage and Hour Administrator.

Finally, in conjunction with the motion for a new trial, respondents moved under Rule 52 (b) to amend and correct the findings of fact by striking therefrom all findings based on not only the background of the collective agreement, the intention of the contracting parties and custom and practice in the longshore industry but also on the statistical surveys, the expert testimony, and the "understanding" in American industry generally as to the meaning of "overtime" (cf. finds. 8-12, 22-29, 37-39; R. 594-8, 601-8, 610-3). The ground recited was that these findings were founded upon testimony and exhibits erroneously received in evidence and lines of proof erroneously permitted to be developed (motion, R. 623-4; affid. R. 6[illegible]-634). The motion was denied *in toto* without comment (R. [illegible]43).

Summary of the Evidence

Respondents continue to urge that the criteria of shift differentials, the alleged prevailing pattern of American industry and portwide statistical surveys, together with the

background of the collective bargaining relationship, do not control in testing for compliance with Section 7 of the Fair Labor Standards Act (*Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590; *Jewell Ridge Corp.* v. *Local No.* 6167, 325 U. S. 161; *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173; 149 *Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199; *Walling* v. *Harnishchfeger Corp.*, 325 U. S. 427), and that the only true test is the "actual fact" as to what respondents were paid. 149 *Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199. But, in view of the fact that the trial judge predicated opinion and findings upon such non-evidentiary materials[8] and that petitioners still place principal reliance upon such elaborate rigmarole in seeking to reinstate the trial court's judgment (Pet. Br., pp. 10-13, 31-4 and notes, 35-7, 37-9, 43), it becomes important to look to the conditions under which longshore work is performed.

Since the trial court intimated that matters of general knowledge and economic data reported by recognized authorities need not have been developed *in extenso* upon the record, but may be nevertheless judicially noticed, or are subject to extrinsic reference by the court for advisory purposes, in considering the evidence we have referred not only to the testimony and the findings, but also to facts of common knowledge. The propriety of such recourse has been recognized by this Court in cases under the Act.[8a]

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[8] Apparently the Circuit Court felt that findings based upon such argumentation had no evidentiary value, for in appending the "pertinent findings" to its opinion [162 F. (2d) at 670, *et seq.*] it omitted those based on "non-evidentiary" matter (R. 660, *et seq.*).

[8a] See with regard to judicial notice *D. A. Schulte, Inc.* v. *Gangi*, 328 U. S. 108 and, on the subject of appropriate reference to economic data as to operation of an industry generally, note the textual comments and footnote material in the opinions in *A. H. Philips, Inc.* v. *Walling*, 324 U. S. 490; *Gemsco* v. *Walling*, 324 U. S. 244; and *United States* v. *Rosenwasser*, 323 U. S. 360.

A.—General Conditions of Employment in the Longshore Industry*

Fundamental to an understanding of employment practices in the longshore industry is the fact that this is the most casual of all American industries. As recognized by one of the principal defense witnesses, "there is no regularity about the whole industry" (R. 69). This results primarily from the vagaries of shipping. As one Government authority has put it:

> The longshoreman can get work only for the period the ship remains in port for the purpose of discharging or loading cargo. More ships in port mean more jobs for longshoremen; a storm delaying sea traffic means no work for the longshoremen during the delay, followed by a period of feverish activity in order to catch up with the work and enable the ship to sail on time. Ships may arrive and leave the port every day, some after a stay of only a day or two, others after a week or 10 days. Sometimes they straggle in one by one, and sometimes they come in numbers. Again, at certain seasons of the year there may be more ships and more cargo than at other seasons. All of these fluctuations in shipping affect the jobs of the longshoremen.[a]

Because of the unpredictable character of ship and cargo arrivals and the need to meet sailing schedules, the shipping companies and stevedores seldom know in advance how long the actual work of loading and discharging will last, or how many men they will need for this work. Hence, there has developed the practice of "hiring the longshoreman by the hour and hiring only when and where actually needed." Hand in hand with this has been the practice of

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* References to the findings are placed in brackets at the end of the paragraphs in this section to indicate that they cover generally the subject matter of the paragraph.

[a] Boris Stern, *Cargo Handling and Longshore Labor Conditions*, U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 550, p. 70; see also Charles P. Barnes, *The Longshoreman*, pp. 57, 169.

knocking off the longshore crews the moment a delay occurs which may tie up loading and unloading operations, in order to keep labor costs at a minimum.[a] The longshoremen's employment "is on a more casual basis than the ordinary day-laborer's who, when he is hired, is at least assured of a day's work.'" [Find. 14-7, R. 598-600; find. 19, R. 601.]

Longshoremen have no way of knowing exactly when a ship will dock. There is no certainty of being taken on, nor is there any guarantee that the work will continue. When a ship arrives, which may be at any hour of the day or night, a small force of men is first hired to warp her in, rig up the booms, open the hatches, set up the gear and otherwise make ready for discharging and loading cargo. After this is done more men are added until the work of discharging is completed and the loading begins. Then "suddenly it may develop that not enough cargo has been assembled on the pier to occupy all the hands engaged, and the entire crew of longshoremen is dismissed until a day or two before sailing time when the men must work day and night to complete the loading and release the ship on scheduled time. These are the conditions of the longshore industry which deservedly place it at the head of the list of casual industries."[b] The same result follows where a winch or boom breaks, adverse weather conditions set in, or any other set-back of a similar nature occurs.[c] Under

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[a] Stern, p. 70; Barnes, p. 57; Edward E. Swanstrom, *The Waterfront Labor Problem*, p. 22. Since the steamship companies are customarily charged by the stevedoring contractors a rate per unit of freight handled, the latter require their foreman to keep costs within the most profitable limits (find. 22-3, R. 601-3). A saving of even a few minutes' pay, where gangs totaling several hundred men are involved, may represent a considerable amount. Barnes, p. 57.

[b] Barnes, p. 57.

[c] Stern, p. 70. See also Barnes, pp. 57, 169; Stern, pp. 72-3.

[d] Barnes, p. 57. "All these things affect the regularity of employment of longshoremen." (R. 767). So do fogs, tides and similar port factors (R. 80-2).

such circumstances men may wait around for hours without daring to leave to seek work elsewhere for fear of gaining the illwill of the hiring foreman, or losing the work should operations suddenly recommence. If a man should not be on hand at the appropriate time, his place would, of course, be taken by another.[10] There is no regular weekly, or even daily, employment. [Find. 14-7, R. 598-600; find. 22, R. 604-5.]

The most continuous characteristic of longshore work is, thus, its irregularity, both of the employment and of its remuneration.[11] Not only is a longshoreman uncertain when he will be hired, but he "has no guarantee of its extent or permanency once employment has been obtained. He may be discharged, just as he may be hired, at any hour."[12] When he starts a particular work stint, he never knows how long it will last (R. 497, 523-4).[13] Thus, "the irregularity of the hours in beginning work is reflected in the uncertain periods of continuous employment" and "there is no greater certainty about the length of time the work will last than there is about the hours."[14] In this respect the work pattern of a longshoreman is "entirely unique" (R. 69-70). He has "no regularity of employment in the sense that a factory worker may have" (R. 35). [Find. 14-5, R. 598-9; find. 19, R. 601].

Because of the difficulty in getting a job and the uncertainty of its duration, the individual longshoreman will

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[10] Barnes, pp. 57, 169.

[11] Petitioners' 1939 statistical survey covering 7,048,440 total man-hours of employment in 367,271 man-weeks worked in a nine-month period shows an *average* workweek of but 19 hours (R. 315-6; Def. Ex. F). The reason for the relatively high rates of pay thus becomes apparent. See also Report of the Citizens Waterfront Committee, *The New York Waterfront* (1946), pp. 2, 11, 30, indicating average annual earnings in longshore labor in New York City in 1939 of $900.

[12] Swanstrom, p. 32; see also Barnes, p. 169.

[13] Stern, p. 70.

[14] Barnes, p. 57.

remain on duty as long as his endurance will last, or the foreman permits him to remain. If the ship had freight waiting to be loaded and the hatch upon which a man was engaged was not fully loaded, a man might keep working at a stretch as long as he was "able to keep lifting" (R. 510). It was common for employees involved in this suit, starting work at 7 o'clock at night, to work straight through the night and then to continue working a considerable portion of the next day (R. 509, 515). There were even occasions when men worked around the clock, not only once but twice, without stopping, except for one hour at meal periods, totaling a 48-hour stretch (R. 509).[15] Such stretches of work, uninterrupted except for short meal periods, were not unknown even in peacetime operations in the Port of New York.[16] [Find. 34, R. 610].

The system of hiring which pertains in the Port of New York has been variously described as "haphazard,"[17] "primitive"[18] and "notorious."[19] Longshoremen seeking work customarily gather outside the entrance to piers at three specified times of day[20] pursuant to custom and collective agreement, at 7:55 a.m., 12:55 p.m. and 6:55 p.m., or at other times, as directed by the steamship company or the contracting stevedore, as for example where a vessel has been delayed, or cargo has failed to arrive.[21] The

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[15] See work-record of Louis Carrington in employment by Bay Ridge, week ending April 2, 1944 (Pl. Ex. 8), for example.

[16] Stern, pp. 72-3.

[17] Swanstrom, p. 32.

[18] Roy S. MacElwee and Thomas R. Taylor, *Wharf Management, Stevedoring and Storage*, p. 58.

[19] Marvel Keller, *Decasualization of Longshore Work in San Francisco*, U. S. Works Progress Administration, National Research Project, Report No. L-2, p. 2.

[20] For the period in suit, see general cargo agreement effective October 1, 1943, par. 8 (a): "Shaping time shall be at 7:55 a. m., 12:55 p. m., 6:55 p. m. Men may be ordered out, however, for any other hour . . . ." (Def. Ex. A).

[21] Stern, p. 75.

men gather in the form of a "shape" or a semi-circle at the pier entrance and are selected by the stevedore foreman individually, or in gangs, for work at each hatch ready for loading on the particular vessel. (R. 34). As each man or member of a specified gang is selected, he reports his name to the timekeeper and receives a brass check with a number in a series, which identifies him on the payroll records and the timekeeper's daily time sheets for that week. Where men have been selected individually, they are organized into gangs and put to work. Where the gang has been previously accustomed to work as a unit, it is assigned to a particular hatch or job (R. 36). A gang may hold together only for a few hours, or it may operate as a unit as long as there is work on the hatch, or on the ship, which may be for less than a day, for several days, or even more than one week.[22] They may, as a group, work "very constantly" for one company, being hired recurrently at its piers (R. 45-6). However, the brass check number is retained for the entire single workweek, no matter how many hours are worked (R. 36-8), and surrendered when the man is paid the following payday.[23] In this respect, the passing years have seen little change in hiring along the New York waterfront. The men shape-up today just as they did when collective bargaining relations began in the industry 30-odd years ago.[24] [Find. 16-7, R. 599-600].

Some stevedore foremen hire their men by the gang and endeavor to keep the men working as a unit whenever there is work for them (R. 45, 79-80). But no gang

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[22] "Like the casuals, however, these permanent men are paid only for time put in and are apt not to be scheduled to work on regular shifts to any greater extent than the casuals. Their advantage rests in their having first preference for work." Keller, p. 2. See also Stern, p. 75.

[23] MacElwee, pp. 58-9; Stern, pp. 70-71, 75.

[24] Swanstrom, p. 26.

is employed regularly or permanently; the men work "only when there is work" (R. 460). Similarly, the practice has grown of posting notices of arrival on bulletin boards, of calling gangs working customarily as a unit to shape-up as their services are needed by prior notice posted at the pier (as in the case of Huron here) or of transmitting news of ship arrival or notification for gangs to report by word of mouth, increasingly by use of the telephone, from the stevedore foreman to the gang leaders or hatch bosses and from them, in turn, to the men (as in the case of Bay Ridge here). These practices in neither case vary the usual requirement that the men congregate at the shape-up at the customary specified times "irrespective of whether they have been working on that pier the day before, or even that very day."[25] [Find. 17-8, R. 600-1].

Further, there is, of course, no definite system of informing the workers as to the exact time of arrival of a ship, or as to the readiness of cargo for loading, or the duration of the work, and they have, of course, no knowledge of how much cargo is to be handled, or how many men will be required for the work.[26] It has been common to inform men called out to report and shape-up by gangs at the time of shaping up that either the ship or the cargo was not ready and that they should call back at a later hour (R. 42-3). In actual effect, the practice "practically all over the port" has been to stretch five or six such shape-ups, rather than the three called for by the collective agreement, and to pay the men only from the time when actually taken on and put to work (R. 497-9, 501-2). [Find. 16, R. 599-600].

The shape-up has been long deemed by those who have studied its effect "a system which has propagated favor-

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[25] Stern, pp. 70, 75; Swanstrom, p. 25.

[26] Stern, p. 77; Swanstrom, p. 25.

itism, bribery and demoralization."[27] It is not our purpose here to advance social reform, but we point to the degree to which these evils exist only because, like the very institution of the shape-up itself, they increase the uncertainty and irregularity of the hours of work and of the days of the week upon which work may be obtained. Thus viewed, they offer additional evidence of the customary lack of regularity of the "basic working day" and the "basic working week". [Cf. find. 14, R. 598-9].

While efforts have been made in ports such as Seattle, San Francisco, Portland, Ore., and Los Angeles to "decasualize" longshore labor, as by the registration of longshoremen and hiring through union halls,[28] nothing has been done to remedy the chaotic situation of hiring prevailing in the longshore industry in the Port of New York. In the view of one expert, "the fluctuations in demand from day to day are shown to be even more violent than the weekly fluctuations" and the division of the port into segments, together with its wide geographical extension, coinciding with the existence of shape-up at all piers at exactly the same hour, renders the situation "even more acute than is warranted in the fluctuations in the total demand for longshore labor."[29] Furthermore, each employer, with a view to protecting his own needs subject to anticipated fluctuations, tends to create a reserve pool of labor, with sufficient margin for contingencies.[30] At the

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[27] Keller, p. 2. According to Father Swanstrom, "The system partly in vogue today of hiring by gangs contributes to its continuance." Swanstrom, p. 27. See also Stern, p. 72; and the recently released Report of The Citizens Waterfront Committee, titled *The New York Waterfront* (1946), pp. 2, 5, 27-8, 35-6: "Every ill . . . on the docks sustains itself through the shape-up . . . It is the badge of the casual employment of the longshoremen".

[28] Stern, pp. 75-6; Keller, p. 1ff.

[29] Stern, pp. 75-6.

[30] Stern, p. 72; see also Swanstrom, pp. 23, 36.

same time, "the men become habituated to seeking work from only the one employer, spasmodic and meager as the work may be."[31] There is, in brief, "absolutely no relation between the demand for and the supply of labor in the longshore industry in the Port of New York."[32]

To sum up, the effect of such factors as the vagaries of shipping conditions, the action of the elements, the uncertainty of cargo arrivals, the institution of the shape-up, the practice of the "stand-by" and the "knock-off," the custom of payment by the hour, the existence of bribery and favoritism, the encouragement of a surplus labor supply, is to make certain that the contract-designated "basic working" day and week do not fix a longshoreman's "regular," "normal" or "usual" working hours. The only regular and normal condition is complete casualism. Work at any hour of the day or day of the week when he is called upon or when he finds it is the longshoreman's customary and usual lot.

β.—Historical Development of Hours and Rates of Pay in the Longshore Industry

The fact that the higher rates of pay prevailing for night and Sunday work on the New York waterfront grew out of the insistence of the longshoremen upon receiving increased pay for work at times when they would rather

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[31] Swanstrom, p. 23.

[32] Swanstrom, p. 36; Stern, p. 75. Although the trial judge in his opinion mentions Mr. Ryan's self-styled efforts to accelerate decasualization, as an effect of placing a higher rate on night work (opin. R. 583, 588), there has been no finding of such tendency (cf. find. 27, R. 604; find. 39, R. 612) and it is belied by statements of all non-partisan authorities. Cf. Report of the Citizens Waterfront Committee, *The New York Waterfront* (1946), pp. 2-3, 18-22. As elsewhere, petitioners have here confused opinion with findings, as if there were no distinction (Pet. Br., pp. 25-6, 31). A "purpose" to decasualize, by avoiding "overtime" except where "essential", does not establish that decasualization has in fact followed as an effect (cf. find. 37, R. 610-1).

be at home with their families, notwithstanding the necessity of such work in view of the uncertainties of maritime conditions, is clear from a survey of the historical development of the higher differentials. The trial court found that

> "Night work, Sunday work, work on Saturday afternoons and on certain legal Holidays, have been compensated at rates higher than the prevailing day rates in the longshore industry in the Port of New York at least as far back as 1887." (Find. 30, R. 608.)

A daily rate of pay prevailing for longshoremen in New York prior to the Civil War was replaced by an hourly rate in 1861.[33] About 1863 the rate was fixed at 25¢, and in the instance of some companies or some piers at 30¢ per hour. Two or three years later a demand for 33¢ was granted, and about 1868, as a result of further agitation for increases, the rate generally paid was lifted to 40¢ per hour for both day and night work. But foremen took advantage of this uniform rate to do a great deal of night and Sunday work. The piers were small, and trucking and tiering could be carried on to greater advantage at night when there were no teams to interfere. The men protested against this and demanded a higher rate for working at these times. In 1872 this demand procured them 40 cents an hour for day work, an advance to 80 cents for night work and $1.00 for Sundays.[34]

Following the panic of 1873, a long depression set in and the immediate effect of the falling off in earnings and profits on the part of employers generally was to foster cuts in wage rates of their workers. Conditions among poor wage earners became desperate. Further, the New York merchants began to protest against the high cost of freight shipments.[35] This was the occasion for a cut in the

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[33] Barnes, pp. 76-7.

[34] Barnes, pp. 77-8.

[35] Lois MacDonald, *The Development of a National Labor Organization*, p. 408. Barnes, pp. 95-6.

longshore wage rates to 30¢ for day work and 45¢ for night work which the stevedore employers decided upon in 1874, of which they gave notice to their workers by newspaper publication.[36] The workers, many of whom were then loosely knit together into a Longshoremen's Union Protective Association, struck against the proposed reduction. The men offered to compromise on retention of the 40¢ day rate and reduction of the night rate to 60¢ from 80¢, if the companies reinstated all the strikers. The strike eventually collapsed after five weeks and the companies imposed the rates upon which they had previously determined.[37]

There were further reductions in wages along the North River resulting in strikes from time to time in the next few years. At some piers, the rates were put as low as 25¢ for day work and 35¢ for night work. On the East River and in Brooklyn a flat rate of 40¢ per hour was continued for day work, but the employers effected a saving in labor cost by reducing the former six men in the hold to four wherever the 40¢ rate applied,[38] thus placing a greater burden of work on the men. These steps occasioned reaction here and there, culminating in a firm position about 1877 by different groups of longshoremen who refused to do night work, although ordered out, until the rate had been raised. Many vessels were delayed and the companies had so much difficulty getting men to work nights that they finally were compelled to restore, with more or less uniformity, the rate of 30¢ for days and 45¢ for night work which they had promulgated in 1874.[39]

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[36] Swanstrom, p. 92; Barnes, pp. 95-6.

[37] Swanstrom, p. 92; Barnes, pp. 77, 95-8.

[38] Barnes, p. 78.

[39] Barnes, pp. 77-8, 98-9; Swanstrom, p. 92. Further difficulty was caused at this time by the 40¢ flat rate per hour prevailing in Brooklyn and on the Manhattan side of the East River for work chiefly on sailing vessels. These were rarely worked at night because longshoremen would not work at night unless they were paid for it at a higher rate. Further, those in this work objected to payment at the North River rates when temporarily brought over to work on piers there. They would not work at night for a differential only 5¢ above their customary day rate. Barnes, pp. 79, 100.

It thus appears that these rates for day and night work, respectively, and their accidental ultimate relationship of 150%, were not the result of collective bargaining by the men, but of unilateral action of the employers previously determined upon and formally announced and the "inability of the Union to hold out the men beyond a five week strike," which eventually "destroyed all faith in its strength";[40] combined with this was the subsequent inability to get workers out at night without the added differential.

By 1879 a revival of trade unionism was in course under the impetus of the Knights of Labor movement and a revival of longshore unionism began in the Port of New York. Demand was made at different piers for 60¢ for night and Sunday work, and this came gradually to be granted in the next few years here and there through the port. At the time of shaping up, the men would decline to work at night unless they received a 30¢ bonus, making the rate 60¢. This was repeated at pier after pier, time after time, until the point had been won virtually throughout the waterfront.[41]

In 1887 occurred the disastrous "Big Strike" led by the Knights of Labor, which tied up the whole New York waterfront. This movement of all the waterfront workers in the Port of New York started as a sympathetic reaction to efforts of employers in two unrelated operations in the harbor to reduce wage rates to the equivalent of 20¢ per hour. The strike was a failure and resulted in lapse of the then prevailing practice of paying 60¢ for night and Sunday and holiday work. On February 12, 1887, an agreement of the shipping managers reestablished the practice of paying 30¢ per hour for day work and 45¢ per hour

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[40] Swanstrom, p. 92; Barnes, pp. 78, 98.

[41] Barnes, pp. 78, 99-102.

for night work; [42] holiday pay was also reduced to 30¢ per hour. This 50% wage cut was unilaterally imposed on the demoralized workers. On the coastwise lines there was a general reduction at all piers to the 25-cent rate.[43]

The rates remained the same until about 1898, when there was a rise from 30¢ to 45¢ for holidays as well as Sundays. About 1900 Sunday work was changed from 45¢ to 60¢ per hour. Meanwhile, however, the North River rates were by no means uniform throughout the Port of New York. Thus, the two principal German shipping lines paid at their piers in Hoboken 25¢ an hour flat with no extras. In June, 1900 they granted an advance of 10¢, paying 35¢ per hour on night work. In 1903 they raised the rates to 30¢ and 45¢ per hour, respectively, as in other parts of the port. At certain other piers rates such as 30¢ for day work and 40¢ for night and Sunday work persisted, however. In 1907 there was a strike for higher rates throughout the port, namely 40¢ for day work and 60¢ for night work and work on Sundays and holidays but the strike was lost and the old rates maintained; and some smaller employers who had advanced wages during the strike reduced them again to the former level.[44]

In 1912 a joint council of the Longshoremen's Union Protective Association and the International Longshoremen's Association, through a wage committee, requested an advance to 35¢ for day work and 50¢ for night work. The steamship companies agreed to pay 33¢ per hour from

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[42] Cf. Minutes of a Meeting of Managers of Steamship Lines trading with the Port of New York, held on Thursday, July 28th, 1887, at 11:30 o'clock, A. M., to "consider the questions arising out of the 'strike' of the 'Longshoremen for 60 cents per hour for night work'" (Def. Ex. A). This self-serving declaration of the shipping managers is not in accord with the facts reported by Barnes, pp. 78, 102-8; Swanstrom, p. 92.

[43] Barnes, pp. 107-8, 79.

[44] Barnes, pp. 80, 111, 116-121.

7 A. M. to 6 P. M., and 50¢ from 7 P. M. to 6 A. M.; 60¢ for Sundays, Christmas and July 4th; and 50¢ for other holidays.[45]

The unsuccessful strike of 1907 had been called by the Longshoremen's Union Protective Association, and during the succeeding years the dissatisfaction stemming from the failure of the strike, as well as the discord in the rank and file and antagonisms among the leaders, resulted in the organization of the International Longshoremen's Association which gradually absorbed the earlier union and has come to represent all of the waterfront workers in the Port of New York through the years.[46]

Joseph P. Ryan, President of the International Longshoremen's Association, who entered longshore work in March of 1912 and was elected to his first union office in 1913 (R. 167-8) testified at the trial that the union's principal objective ever since has been "to have the work done in the day time as much as possible" (R. 173). According to Mr. Ryan: "We make the day rate as high as we possibly can get it and then make the night rate as high as possible" (R. 187).[46a] It is quite evident, moreover, that since the organization of the union on a permanent basis at the time of the first World War, there has been little to vary or change the original objectives of the longshore workers in taking collective action to better their rates of pay, as revealed by historical developments before the International Longshoremen's Association came into existence. The employers have found it difficult to get men to turn out for the

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[45] Barnes, pp. 80-81.

[46] Swanstrom, pp. 91-2; Barnes, pp. 121-3.

[46a] One of the principal defense witnesses stated that in his belief the union's reason for having a 150% rate for all hours outside the basic work-day was to gain for its members the added income from the higher rate (R. 123). Another conceded that the men "felt they are entitled to more for night work" (R. 43).

night shape. Not infrequently they either do not show up at all or flatly refuse to work nights (find. 27, R. 604). It has been necessary, apparently, to continue the bait of a high night rate as well as to provide, under all the collective agreements in effect over a period of many years, that "men shall work any night of the week, or on Sundays, Holidays or Saturday afternoons, when required" (find. 20, R. 601).

Further evidence of the fact that the workers in the industry collectively, and the union in their behalf, have sought primarily to get each of the different rates "as high as possible" is indicated by the fact that the rates have frequently varied from the relationship of 150% as between day and night compensation as it existed in 1874. See comparison of the relationship of the two sets of rates for general cargo, from time of organization of the present union through the period in suit (find. 31, R. 608-9).

During the period from 1916 to 1918 the collective agreement specified one rate of pay for what was termed "*day work*" and a higher rate of pay for "*night work*", as well as a third rate of pay for Sundays and certain specified holidays. In 1918 the contract ceased to use the words "day" and "night" for the obvious reason that the triple rate system was dropped and the higher rate for work outside the basic working day was referred to as the rate for "all other time." This nomenclature continued down until 1938. There was no indication in the contracts through these years that the general cargo differential was other than a higher rate for night work (find. 31-2, R. 608-9).

In the fall of 1938, after enactment of the Fair Labor Standards Act, the rate payable during the customary daytime hours was for the first time referred to in the general cargo agreement as a "straight time rate"; and in the provision establishing the higher rate for "all other time" there was for the first time introduced, with reference to

work at night, Saturday afternoons, Sundays and holidays, the words "shall be considered overtime and shall be paid for at the overtime rate."[47] The collective parties, nevertheless, from the passage of the Act through the period in suit, made no actual change in the general manner of compensating longshoremen as compared with that prevailing previously, except for the rare circumstance of an employee working more than 40 "straight time" hours Monday through Friday and Saturday morning (find. 31-3, R. 608-10; find. 43(a), R. 614).

The "basic working week" remained at 44 hours per week from the 1921 collective agreement through the contract pertaining between October 1, 1943 and September, 1945, the period involved in this suit. Meanwhile the maximum workweek permissible under the Fair Labor Standards Act without payment of time and one-half overtime was 44 hours between October 24, 1938 and October 24, 1939, 42 hours between October 24, 1939 and October 24, 1940 and 40 hours subsequent to October 24, 1940. The workweek provided in the collective agreement was thus contrary to the paramount prevailing law of the land, as Mr. Ryan admitted. He added, however, that the union had always insisted in its negotiations upon a 40-hour week, but the employers refused to consider it and said "it was not applicable to the steamship industry" (R. 194-5). The union's agreements have, theoretically, set up a "basic working day" and "basic working week" of 8 and 44 hours, respectively (Def. Ex. A). Notwithstanding, it is clear that these have not been the hours worked by longshoremen either normally, regularly or customarily (find. 14-5, R. 598-9; find. 19, R. 661; find. 35-6, R. 663; find. 40-1, R. 612-4; find. 45, R. 615).

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[47] The Fair Labor Standards Act was signed by the President June 25, 1938, to take effect 120 days later or October 24, 1938.

C.—Respondents' Pattern of Employment*

Perhaps more appropriate to determination of the cases at bar is a specific consideration of the working conditions and patterns of the 20 longshoremen who are respondents here. According to the President of the International Longshoremen's Association, when the United States entered the war many of the oldtime members of the union working at the Chelsea piers on the North River objected to extensive night work in which the stevedoring contractors desired them to participate (R. 175-6).[50] In view of the generally short labor supply and the number of longshoremen going into war work, together with this attitude on the part of the old-line dock workers, the employers said, according to Mr. Ryan:

> "We will have to bring * * * colored men in and work nights. * * * Let them bring them in and let them work nights (R. 176)."

While it is clear that there had been some Negroes in longshore work for many years in the port of New York,[51] it appears to have been extremely difficult for colored longshoremen to get work on shape-up in the daytime (R. 459, 461-2, 470, 480, 499-500, 520). Huron took on several colored gangs upon resumption of its operations in New York Harbor in 1944 following the elimination of the submarine menace, which had occasioned the transfer of the Grace Line's shipping activities to the Port of New Or-

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* References to the findings are placed in brackets at the end of the paragraphs in this section to indicate that they cover generally the subject matter of the paragraph.

[50] One of these piers was Furness-Withy Line, served by petitioner-Bay Ridge (R. 210-1, 175-6).

[51] Several oldtimers who testified at the trial had been members of the union and had been engaged continuously in the industry for upwards of 25 or 30 years (R. 493, 514).

leans, and assigned some of these gangs exclusively to night work (R. 98, 486). Not only did they start working on night shift from the very time they were taken on, but the night when they commenced operations upon organization was a Sunday night (R. 456, 479, 487).

The Grace Line required a considerable amount of night work as well as work on Sundays and holidays even in normal times and during the period of the war the operation "was practically around the clock, day in and day out, except • • • Saturday nights" (R. 100, 272).[52] The company worked whatever hours "they needed to get ships out. They wanted to work all the hours possible" toward this end (R. 274). During the war, Huron carried 7 gangs working exclusively at night, and since the war there were, at the time of trial, still 5 to 7 gangs working at night only on Grace Line ships (R. 104, 460, 470).[52a] In addition, day gangs employed by Huron were switched to night work in regular rotation—2 gangs going on to night work exclusively for a period of one week and then back to days again and 2 other gangs going into night work the following week, in sequence. This was "regular" and not exceptional (R. 104, 470). Some plaintiffs in the Huron case worked exclusively by night, and others in day work and in night work, in rotation (Pl. Ex. 7). [Find. 34-5, R. 610; find. 40, R. 612-3; cf. find. 19-20, R. 601].

Plaintiffs employed by Bay Ridge worked both by day and by night (R. 497). With some the work was approxi-

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[52] There were clearly a number of stevedoring companies in the Port of New York, even in peacetime, which required regular night work by regular night crews (R. 504; find. 35, R. 610). The International Longshoremen's Association has never taken any formal action, by resolution or otherwise, in opposition to night work (R. 178).

[52a] Since, as the trial judge found (find. 24, R. 603), the port had by then reverted to "peacetime patterns" it appears reasonably clear that the latter includes consistent night work by regular night gangs. Cf. find. 35, R. 610.

mately evenly divided; with others, the night work predominated but was commingled with periods when day work was performed within the same workweek (Pl. Ex. 8). Nevertheless, there has been no extensive period, according to one oldtimer, who came into the industry in 1908 and joined the union in 1916, when the colored men got regular day work for long stretches without shifts of night duty (R. 499-500). On the other hand, another veteran Negro longshoreman recalled working nights only, for 7 to 8 nights at a stretch without day work, quite frequently (R. 514-5). Another worked a stretch of 14 nights in a row without day work for Bay Ridge during the period in suit (R. 524). [Find. 34-5, R. 610; find. 40, R. 612-3; cf. find. 19-20, R. 601].

It is quite clear that these colored men would have preferred day work, if they "could get it and make enough money to live * * * because nights were made to rest * * * and * * * be home with the family" and this was true, even though day work was compensated at a lower rate than night work (R. 486, 516, 523). Notwithstanding this preference, the men in order to earn a living were accustomed to "take whatever they were ordered to do" (R. 516).

Throughout the period in suit the men worked on Saturdays, Sundays and holidays whenever work was available to them, just as on any other day, and there was no less work available on those days than on any other day of the week (R. 516-7). As one oldtimer, with 38 years of experience in the port and a member of the union for 30 years, put it, a man would have to "look for a job Sunday morning as well as Monday morning." And the men would try to get work Sunday "the same as every other day in the week" (R. 499). A representative of the Huron Company conceded that "there was a considerable amount of Sunday work—there is no question about it" and the same was true as to holidays (R. 105, 271). When a ship entered the harbor on a Sunday it would, likely as not, start to load

or discharge that day (R. 467). Just as it was quite usual for men to start a job on a ship or hatch at night (R. 77), so it was quite usual for them to start on a Saturday afternoon or Sunday night (find. 34, R. 610). And there were some weeks in which Sunday, and Sunday night, was the only time when the men found work available (R. 456, 479; Pl. Ex. 7).[53] In case of the regular night gangs employed by Huron, when they worked Saturdays, Sundays and holidays, their work was always at night (R. 472, 488),[53] and in the case of gangs working in the daytime with some rotation of night work, a substantial portion of their work on Saturdays, Sundays and holidays was night work. Analysis of the work records of the 10 selected plaintiffs in the Huron case shows that at least 65% of their work on Saturdays, Sundays and holidays was at night.[54] [Find. 44, R. 615; find. 46, R. 606; cf. find. 19-20, R. 601; find. 34-5, R. 610].

Further indicating the fact that Saturdays, Sundays and holidays were worked by the men as normally as any other time of the week was the practice prevailing, when a loading job which was in process on Friday night was not completed that night and could not be completed Saturday morning, of calling the Friday night crew back Saturday night to finish it on the night shift, notwithstanding the collective agreement. The same was true of work in process on Saturday which was not completed that day, or by day gangs called out on Sunday; in such event, the night gangs would be summoned to continue with the job on Sunday night (R. 517). The stevedore contractors did not knock off the crews on Friday night or Saturday morning, as the case might be, and resume Monday morning, as would usually be the case with factory work; they kept the gangs working Saturdays and Sundays if the ship was still there and cargo remained (R. 517). They even undertook to penalize men who did not appear when their gangs were

[53] See also Pl. Ex. 7, par. 7 (R. 552) and employee work records.

[54] See table (R. 642) compiled from records, Pl. Ex. 7.

summoned for work on such days by denying them a full week's work (R. 472, 473-4, 488-9).[55]

In the case of Huron, the company organized gangs as required to meet the stress of shipping conditions (R. 485-6). The men were ordered to watch the bulletin board at the Grace Line pier daily, or to watch it when a ship for which they might be needed was expected; orders would go up at one o'clock in the afternoon calling out night crews required to work a shift that night (R. 461-2, 488). In some cases the stevedore contractor telephoned the hatch boss, or gang boss, to get together his gang for work at a certain time; the latter would then line up the men preliminarily at 5 o'clock and bring them down with him to the pier for the 6:55 P. M. shape-up (R. 486, 489-90).[56] This would occur primarily when the company found that it was not getting sufficient labor on shape-up at the pier (R. 490-1). In any event, however, the men were *hired* only at the regular shape-up and this alone could determine whether an individual would be put to work, regardless of prior posting of notice or telephone summons, and regardless of whether he had previously performed work that day (R. 34-5, 461-2, 477). [Find. 36, R. 610; find. 18, R. 601].

With Bay Ridge, telephone notification to the particular gangs to report for work at a particular time was the customary practice (R. 494, 516). The company representative in charge of colored longshoremen would call the head foreman by telephone daily to advise what gangs would be needed at the various piers and indicate the time when

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[55] One of the Huron employees reported that this happened to him twice after October 1, 1945, although on one occasion his wife was very sick and he had had to stay out to look after her (R. 473-4). Even before October 1, 1945, while there was no *formalized* practice of applying such penalty, the stevedore contractor would from time to time penalize the men in this fashion (R. 488-9).

[56] These men were all International Longshoremen's Association members (R. 492).

they should report at the shape-up. The head foreman then called the various gang bosses, who customarily maintained telephones in their home, or they would call him and pass the information on to the men (R. 494, 516). This usually occurred between 2 and 3 o'clock in the afternoon where work was to be performed by the gang that night (R. 516). Between 4 and 5 p. m. the individual longshoremen would call the hatch boss on his home telephone and learn from him whether the gang was summoned to work that night (R. 516). Information as to gangs required to report on Sundays, and advice whether the gangs would report for day work or for night work, was transmitted by telephone in the same manner at about 11 a. m. on Saturday (R. 499). [Find. 36, R. 610; find. 18, R. 601].

The stevedore foreman in charge of the colored group would sometimes call the secretary of the union local and the men would then through telephoning the union before 5 p. m. receive notification as to whether to report at the night shape-up or to shape-up the next morning (R. 507, 521). Sometimes the men would be told on knocking off, for example at 6 a. m. following work on the night shift, to report back the same night (R. 496-7, 509). More commonly the pier foreman might advise the men to call for further orders. Such orders might call out the gang for day work or for night work, regardless of what they had previously worked. There was no way of telling whether such a call would result in work at all or, if it did, whether it would be day work or night work. As one man put it: "It was a miracle to know tonight where you would go tomorrow" (R. 509). The men usually working in Bay Ridge gangs, when receiving notification that work would be available at a specific pier, would still appear at the shape-up and be taken on at that time if they were to work at all (R. 594-5). [Find. 18, R. 601; find. 36, R. 610].

It thus appears that the men were called to work in the case of both petitioners by notification transmitted in one manner or another by the stevedoring contractor, and the

company not only controlled, but determined in advance, the time of day and the day of the week when the particular gang was to be called (Pet. Br., p. 9; find. 16, R. 599-600). Only when the men found there was no work at the accustomed place did they try to get work at other piers, or to fill in or shape-up with other companies (R. 458-460, 507). There were times when the men were summoned to report to shape-up at a specified time and, when they arrived there, learned that the ship had not arrived, that there would be no work and that they would not be paid (R. 500, 505, 517-8, 521). This happened from time to time on both day and night work. When on day work a man might be told to report back at a later time; when on night work he was not (R. 522). [Find. 36, R. 610; find. 22, R. 604-5].

The trial judge ultimately found both that the pattern of work in the longshore industry is "completely unique" and that the hours of the "basic working day" as defined in the contract were not the hours normally, regularly or usually worked by the respondents (find. 14-5, R. 598-9; find. 41, R. 614; find. 45, R. 615). And this must inevitably have followed from an examination of their work pattern (Chart, find. 40, R. 613; see Appendix, this brief):

Name	*Total Contract "Straight Time" Hours*	*Total Contract "Overtime" Hours*
Huron		
Blue	252.	206.
Dixon	8.	2,595.
Elliott	370.	214.5
Fleetwood	833.5	951.
Fuller	208.5	230.5
Johnson, J. J.	0.	3,210.
McGee	0.	2,598.5
Short	1,248.	1,009.
Steele	0.	1,747.5
Toppin	6.5	3,312.5
TOTAL HURON	2,926.5	16,074.5

Name	Total Contract "Straight Time" Hours	Total Contract "Overtime" Hours
Bay Ridge		
Aaron	52.	99.
Alston	318.5	850.
Brooks	28.	150.5
Carrington	298.5	344.5
Green	103.	576.5
Hendrix	44.	8.
Johnson, A.	204.	250.
Roper	511.	1,158.
Stephens	0.	44.5
Tolbert	715.5	1,215.5
TOTAL BAY RIDGE	2,274.5	4,696.5
TOTAL BOTH PETITIONERS	5,201.	20,771.

About 80% of respondents' work was thus during the contractual "overtime" period. Some of them worked nothing but contractual "overtime". One worked over 3000 hours of so-called "overtime" without a single minute of contractual "straight time". Sixteen of the twenty worked more "overtime" than "straight time".

Summary of Argument

It is respondents' position primarily that (1) under appropriate principles established by prior decisions of this court, payments at rates termed "overtime" in the longshore agreements did not meet the overtime requirements of Section 7 of the Act, being attuned to "neither the purpose nor the mechanics" of the statute; but (2) such payments were necessary to induce longshoremen to accept employment at undesirable times of the day and days of the week under the circumstances of operation in a "unique industry"; and therefore (3) payments at these higher rates were payments at the employees' "regular rate of pay"

for such hours, within the meaning of Section 7. This follows because (1) the "overtime hourly rates" were paid for work at specified times regardless of the number of hours previously worked in the day or week and without relation to excessivity of hours over any fixed number normally or regularly worked; (2) the longshoremen were paid at the contract "straight time" rate for many statutory overtime hours and at the contract "overtime" rate for many statutory straight time hours; (3) there was no increase in the employer's labor cost at the end of the 40-hour week upon the basis of compensation actually and ordinarily paid for nights, Sundays and holidays, which constitute normal, and not unusual, working time for longshoremen.

Further, in accordance with the Administrator's interpretation, which is entitled to great weight, payments at the higher rates here for work customarily performed at undesirable times, outside the basic pattern of clock hours, are not properly overtime within the meaning of the Act, regardless of contract designation. This is because (1) the principles established by the Administrator to determine where overtime payable pursuant to contract generally may be offset against that due under the Act are not fulfilled here, since the pay is not extra compensation for work outside normal and regular working hours; (2) he has specifically indicated his opinion that the higher rate payments under the prevailing pattern of agreements in the unique circumstances of operation in the longshore industry for working night or "off" hours are not true overtime under the Act; (3) in any event contractual "overtime" under the longshore agreements does not meet the appropriate standard of excessivity asserted by the Government and sustained by this Court in prior litigation.

As the petition here disclosed (Pet. p. 25), the Administrator believes that the Circuit Court, upon the facts found by the trial judge, gave "proper consideration * * * to his

interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct". Since the filing of the petition the Administrator has made known his reasoning: night "overtime" under the longshore contracts cannot be statutory overtime within the Act's intendment "because it is payable to an employee who comes to work at 5 o'clock, even though he has performed no work previously on that date". And as to Saturday afternoon, Sunday and holiday "overtime" here, the Circuit Court's holding was correct in view of the findings below (R. 658-9). Accordingly, the Second Circuit's judgment should be in all respects upheld.

In no event, finally, may the trial court's judgment be reinstated, since substantial error was committed in various rulings on the evidence. If reversal should by any chance be ordered, retrial should follow. (See discussion, pp. 8-11, *supra.*)

ARGUMENT

I

Under appropriate principles established by prior decisions of this Court, payments at rates termed "overtime" in the longshore agreements did not meet the statutory requirements of Section 7 of the Act.

The overtime provision in Section 7 of the Fair Labor Standards Act is drawn in clear and unequivocal terms. It forbids any employer to employ any worker within its scope for more than 40 hours "*unless* such employee receives compensation for his employment *in excess* of the hours above specified at a rate not less than one and one-half times the *regular rate* at which he is employed." The language used indicates a design (1) to proscribe overtime absolutely unless the requisite additional compensation be paid for any *excess* over the limited workweek, and (2) to

require the additional compensation to be paid at 150% of the *regular rate*. Section 7 (a) does not use the word "overtime", but rather the term "*excess*". Petitioners' construction, which the trial court accepted,—that "overtime" as defined in a collective agreement solely in terms of work at undesirable hours outside a specified clock pattern, without reference to excessivity of the hours worked over a particular number normally or regularly worked by the employee, may comply with Section 7—does violence to both the statutory language and the statutory purpose.

This Court has now several times indicated that the basis for computing and paying overtime under Section 7 must be consistent with the congressional purpose: (1) to spread employment by inducing reduction of the workweek through the placing of a severe penalty upon all work over 40 hours per week; (2) to compensate employees for the burden of hours in excess of the Act's maximum standard. See *Overnight Motor Transport. Co.* v. *Missel*, 316 U. S. 572, 577-578; *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 40; *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U. S. 419, 423-4; *Jewell Ridge Coal Corp.* v. *Local 6167*, 325 U. S. 161, 167. And the President's message of November 15, 1937, calling for the enactment of this type of legislation referred to protection from "excessive hours" and "the evil of overwork". See 316 U. S. 572, 578. Thus, in addition to the two principal elements, the statute was also designed to effect "a reduction in hours • • • to maintain health". *Southland Co.* v. *Bayley*, 319 U. S. 44, 48.

It is now several years since this Court in the *Helmerich & Payne* case first rejected a "split day plan" whereby a basic hourly rate was paid for the first 4 or 5 hours worked each day, the weekly total of such hours not exceeding 40, and the remaining hours worked were compensated, in accordance with a collective bargaining agreement, at one and one-half times the contractual base rate.

The employees there regularly worked 8, 10 and 12 hour daily shifts which, under the employment contracts, were divided into two parts, to which "regular" and "overtime" rates, respectively, applied. The first 4 hours of each 8 hour tour, and the first 5 hours of each 10 or 12 hour tour, were assigned a specific hourly "base or regular rate" and the rest were termed "overtime" under the agreement and compensated for at one and one-half times the "base or regular rate". As the Court observed, in holding this plan to be inadequate compliance with the overtime provision of the Act:

> Section 7(a) limits to 40 a week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate "not less than one and one-half times the regular rate at which he is employed." The split-day plan here in issue satisfies neither the purpose nor the mechanics of this requirement . . . It enabled respondent to avoid paying real overtime wages for at least the first 40 hours worked in excess of the statutory maximum workweek, thus negativing any possible effect such a payment might have had upon the spreading of employment. And the plan was so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one-half times the actual regular rate [323 U. S. 37, 40].

The Court noted also a separate reason for concluding that the "split day plan" did not comply with the Act's overtime requirements: the "overtime" paid was not realistically based upon the hourly rate of compensation "actually paid for ordinary non-overtime hours". That is, in determining the regular rate, the employer did not look to the compensation normally and regularly paid the workers for the "first 40 hours actually and regularly worked." The Court's reasoning on this point was as follows:

> The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by § 7(a). While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek * * *. To compute this regular rate for respondent's employees, assuming the same wages and tours, required only the simple process of dividing the wages received for each tour by the number of hours in that tour. This regular rate was then applicable to the first 40 hours regularly worked on the tours and the overtime rate (150% of the regular rate) became effective as to all hours worked in excess of 40.
>
> But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked * * *. Thus when an employee on regular eight hour tours had actually worked 40 hours, respondent could point to the employee's contract and claim that he had worked only 20 "regular" hours and 20 "overtime" hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours [323 U. S. 37, 40-1].

The *Youngerman-Reynolds* case indicates that compliance with Section 7 requires *an addition to wages* in the requisite amount after the 40-hour point has been passed in the workweek:

> Under § 7(a) an employer is required to compensate his employees for all hours in excess of 40 at not less than one and one-half times the regular rate at which they are employed. Thus by increasing the employer's labor costs by 50% *at the end of the 40-hour week* and by giving the employees a 50% premium *for all excess hours*, § 7(a) achieves its dual purpose of inducing the employer to reduce the hours

> of work and to employ more men and of compensating the employees for the burden of a long workweek (Emphasis supplied) [325 U. S. 419, 423-4].

In *Walling* v. *Harnischfeger*, 325 U. S. 427, employees were compensated pursuant to a collective bargaining agreement under which they were paid a basic hourly rate which by the terms of the agreement was to be considered the "regular rate," and in addition received incentive bonuses varying with the output, or when assigned to "non-incentive" work, an addition of at least 20% of the basic hourly rate. They were held underpaid nevertheless under Section 7 since their time and one-half was based only upon the base rate. Declining to accept the designation of the "regular rate" made in the agreement, the Court commented:

> Those who receive hourly rates at least 20% higher than their guaranteed base rates clearly are paid a regular rate identical with the higher rate and the failure of respondent to pay them for overtime labor on the basis of such a rate is a plain violation of the terms and spirit of § 7(a). No contract designation of the base rate as the "regular rate" can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of § 7(a), are impossible of achievement under such a computation [325 U. S. 427, 430].

Note also the late Chief Justice's reaffirmation, in dissenting there, of his earlier approval of the *Helmerich & Payne* decision:

> In the *Helmerich & Payne* case, no attempt was made by the employer to apply the asserted regular hourly rate to the first forty hours of the workweek, the actual wage paid being greater. In consequence, the

> overtime wage was less than one and one-half times the hourly wage in fact paid during the first forty hours of the workweek. This was an obvious failure to comply with overtime pay requirements of the statute [325 U. S. 427, 441].

The indication thus is that contractual payments designated by the parties as "overtime" satisfy the requirements of Section 7 of the Act only if marked by payment of increased compensation for excessivity of hours over a given number normally or regularly worked by the employee. Measured by that test, contractual "overtime" under the longshore agreements "satisfies neither the purpose nor the mechanics" of the statutory requirement: (1) it enabled petitioners to avoid paying any real penalty, regardless of the number of hours previously worked in the day or week, with no upward limit whatever; (2) it could thus have had no possible effect upon reducing hours or spreading employment; (3) it failed to compensate employees, for hours worked in excess of the first 40, at 150% of the rates "actually paid for ordinary, non-overtime hours". On the contrary, there was no increase in labor cost following 40 hours of work and no premium for the burden of excessive hours beyond that normally paid without the excess. The Court's earlier decisions standing alone would thus appear to foreclose the reliance sought to be placed upon the "contractual nomenclature" here.

Further than that, however, the present Chief Justice less than a year ago, in *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17, reaffirmed the effect of the holding in the *Helmerich & Payne* case and stated the applicable doctrine as follows:

> In those weeks in which an employee worked statutory overtime, he was paid at the contract "overtime" rate for many straight-time hours and at the contract "regular" rate for many overtime hours. Obviously, these prescribed rates were not actual regular and overtime rates, although so named in the plan. Con-

sequently, as in Overnight Motor Co. v. Missel, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked [331 U. S. 17, 23].

In the instant case the trial court has found (find. 43 (b)-(d), R. 615):

[1] A longshoreman who worked on general cargo in excess of 40 hours a week, all of his working hours being "overtime" hours, was paid the "overtime" hourly rate of $1.87½ an hour, for all hours both within and beyond 40.

[2] A longshoreman who worked on general cargo 40 hours or more during "overtime" hours, and also worked on Saturday from 8 a. m. to 12 noon during the same workweek, received $1.87½, the "overtime hourly rate", for the "overtime" hours, and $1.25, the "straight time hourly rate", for the Saturday hours.

[3] A longshoreman who worked on general cargo for eight hours on Monday, from 8 a. m. to 5 p. m., and ten "overtime" hours during each of the following four days and also on Saturdays from 8 a. m. to noon, received compensation at the "straight time" rate for Monday and Saturday, and the "overtime" rate for the other hours.

[4] A longshoreman who worked on general cargo for 40 hours or less during the week, all of these hours being within the "overtime" classification, was paid the "overtime hourly rate" of $1.87½ per hour.

In other words, here, too, respondents, in weeks in which they worked statutory overtime, "were paid at the contract 'overtime' rate for many straight-time hours and at the contract 'regular' rate for many overtime hours". Even petitioners have recognized (Pet. Br., p. 14) that the higher rates were paid "regardless of whether respondents had worked more or less than a total of 8 hours in any one day

or 40 hours during the week"; they normally received no addition to the contractual rates regardless of how many hours they worked daily or weekly.[57] Here too it must thus be concluded that their "prescribed rates were not the actual regular and overtime rates", although so termed in the collective agreement.

"Split day plans" which, pursuant to collective agreement, divided the working day into 6 hours of "regular" time and 2 hours of "overtime", and 7 hours of "regular" time and 1 hour of "overtime", respectively; have for like reasons been held inadequate compliance with Section 7 of the Act. *Walling* v. *Alaska Pacific Consolidated Mining Co.*, 152 F. (2d) 812, cert. den. 66 S. Ct. 960; *Robertson* v. *Alaska Gold Mining Co.*, 157 F. (2d) 876, cert. granted for purpose of modifying Circuit Court judgment on remand, 67 S. Ct. 1728. In the *Robertson* case, this result was reached notwithstanding the fact that a certified labor union representing the employees had insisted upon the form of agreement in effect, the Ninth Circuit noting that, under a "split day" contract, the "overtime rate is not compensation for true overtime, that is, hours worked in excess of the normal work week or work day". See also *Roland Electrical Co.* v. *Black*, 163 F. (2d) 417, now pending on petition for certiorari to the Fourth Circuit on another issue (No. 340).

The precise issue here, involving longshore contracts of the familiar "clock hour" type covering stevedoring operations on the Great Lakes, was several years ago passed upon favorably to respondents' contention by the Seventh Circuit. In *Cabunac* v. *Natl. Terminals Corp.*, 139 F. (2d) 853, affg. *Intl. Longshoremen's Assn.* v. *Natl. Terminals Corp.*, 50 F. Supp. 26 (E. D. Wis.), Circuit Judge Minton

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[57] And when they did pay additional wages, rarely, on a weekly basis, in the making of the so-called "Wage and Hour Adjustment", petitioners revealed that they well understood, when they chose to, the Act's concept of overtime. See notes 3a-4 *supra*.

observed:[58]

> It seems evident to us, as it did to the District Court, that the "overtime" rate was merely the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workman's standpoint, and that this rate is the "regular rate" to be paid for work on the night shift, on Sundays, and on certain holidays, within the meaning of the Fair Labor Standards Act.

As the Second Circuit observed below, the Great Lakes decisions involved "substantially similar collective bargaining agreements and * * * facts in many respects the same" as those at bar (R. 657). The same result was reached more recently in a test case in Puerto Rico in which transcripts of the expert testimony in the cases at bar, similar trial techniques and identical arguments were advanced by the Government. In *Ferrer* v. *Waterman S. S. Corp.*, 70 F. Supp. 1 (D. P. R.) the court rejected the legal contentions which Judge Rifkind accepted on trial here, holding that rates for "extraordinary" or "overtime" hours, nights, Sundays and holidays, under the Puerto Rican longshore agreements, constituted merely "a series of regular or basic rates which fluctuated according to the time of day and cargo handled, and bore no relation to hours worked in excess of forty", hence could not be overtime in accord with Section 7.[59] See also *Roland Electrical Co.* v. *Black*, 163 F. (2d) 417 (C. C. A. 4).

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[58] It may perhaps have some passing significance that both Judge Duffy, who rendered the opinion in the lower court, and Judge Minton, who rendered the Circuit Court's opinion, were members of the United States Senate at the time when the Fair Labor Standards Act passed that body.

[59] The Government, in its brief to the Special Master preceding Judge Cooper's decision in the *Ferrer* case, said: "The collective bargaining agreements in this case follow a pattern obtaining generally on all the waterfronts of the United States and the decision in this case will be largely controlling of claims pending, or likely to be prosecuted, in all parts of the country" [Br. p. 18]. The docket in that case was returned to the District Court on the Government's request, during pendency of appeal in the First Circuit, while the cases at bar were before the Second Circuit.

It follows, in keeping with the principles established by prior decisions of this Court, as well as lesser courts which have passed on similar longshore agreements elsewhere, that (1) the payments at the 'overtime hourly rate'' pursuant to the agreements were not overtime under the Act; (2) these payments were but the higher rates paid longshoremen for hours normally and customarily worked at undesirable times of day and days of the week; (3) payments at these higher rates were payments at the employees' "regular rate of pay" for such hours, within the meaning of Section 7.[60]

II

According to the Administrator's interpretation, which is entitled to great weight, payments at a higher rate under the longshore agreements for work at undesirable hours outside a basic clock pattern are not overtime within the meaning of the Act.

The trial court accepted the contractual designation as "overtime" of all work outside a specified period of clock hours and permitted offset of the payments at the higher rates against overtime due on a 40-hour basis under the Act. In so determining the court did not specifically reject, but entirely *ignored*, the Administrator's expressions of opinion on the issue here, which this court has held are entitled to great weight. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 580, note 17; *Skidmore* v. *Swift*

[60] See also history of the development of the rates above, for evidence that the higher rates evolved to induce workmen to turn out at undesirable times when longshore operations were necessary, and that the 150% relationship of "overtime" to "straight time" was accidental, in a unique industry. This brief, pp. 20-27, *supra*. Findings based upon what the trial court received as argument, not evidentiary matter, should not foreclose recourse to recognized authorities for the correct historical facts. Cf. this brief, pp. 8-11, *supra* and p. 62, *infra*.

& *Co.*, 323 U. S. 134, 139-140. Petitioners' brief here has likewise ignored the Administrator's position, but the petition took cognizance of it.

The Second Circuit, in reversing, gave consideration to "the administrative interpretations" and observed that they "suggest no conclusion different from ours" (R. 658). "Indeed" said Judge Frank, "they support plaintiffs' contentions" (R. 658, note 7); and he referred to the Administrator's opinion[61] set out in one of the interpretative bulletins published for guidance of the public, as follows:

> The question has been asked as to what are the requirements of section 7 in cases where a union agreement * * * calls for the payment of overtime or other special compensation which is not required to be paid by the act. Extra compensation paid for overtime work, even if required to be paid by a union agreement * * * need not be included in determining the employee's regular hourly rate of pay. * * * Furthermore, in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—*paid by him as compensation for overtime work—that is, for hours worked outside the normal or regular working hours*—regardless of whether he is required to pay such compensation by a union or other agreement. In no week, of course, will the overtime requirements of Section 7 be met unless the employee receives an amount equal to at least his regular rate of pay for 40 hours and time and one-half such rate for the hours worked in excess of 40. It should be noted, however, that the Act does not supersede provisions of a collective bargaining agreement or other agreement between an employer and his employees which set standards higher than those set in the act; which, for example, require the employer to

[61] U. S. Department of Labor, Wage and Hour Division, Interpretative Bulletin No. 4, par. 69, Wage & Hour Manual (1944-45 Cum. Ed.), p. 167.

> pay time and a half for all hours worked in excess of 8 hours a day regardless of how many hours in the aggregate the employee may work in a week.

From the words as originally italicized in the opinion, it is clear that the compensation is for true overtime work within the statutory intendment only if *"for hours worked outside the normal or regular working hours,"* and the examples as given immediately thereafter speak purely in terms of excessivity, being related to such standards as "All Hours Worked in Excess of 40, the Regular Weekly Number of Hours Fixed in the Agreement" and "All Hours Worked in Excess of 8 Hours, the Normal or Regular Workday."[62]

In a later opinion[63] amplifying the interpretation on this point, the Assistant Solicitor of Labor, speaking for the Administrator, stated:

> In making a determination as to whether an employee is receiving overtime compensation or is being paid at a higher rate, there are two factors to consider; namely, the hours of work which are being compensated for and the understanding of the parties as to the nature of the compensation. Extra compensation may be considered as overtime compensation only if the following conditions exist:
>
> 1. The hours compensated for must be hours not normally worked by the employee; for example, work on Sundays, holidays, or at a time of the day when the employee does not normally work.
>
> 2. It must clearly appear from the agreement of employment that the payment of extra compensation is overtime compensation for such hours and is not merely a higher rate of pay.
>
> *If these two conditions are not met, the employer may not regard the extra compensation as discharging*

[62] Interpretative Bulletin No. 4, par. 70, cases (1) and (3).

[63] Opinion reported in Wage & Hour Manual (1944-45 Cum. Ed.), p. 227, cited approvingly by the Second Circuit here (R. 658-9).

all or any part of his obligations under Section 7 of the Act. In such a case, the employee must be treated as working at several different rates of pay during the week. (Emphasis supplied).[64]

It is perfectly clear from the evidence in the two cases at bar that it was normal and usual for Huron and Bay Ridge longshoremen to work nights and on Saturday afternoons, Sundays and holidays, and such was the common practice of both petitioners and respondents here.[65] It is just as clear from more specific opinions of the Administrator that payment at the higher rate for night work in the longshore industry is not overtime, but merely an increased rate actually paid to men who work at an inconvenient and undesirable time of day, in an industry where unique circumstances dictate such an inducement as an essential of operation. See *Cabunac* v. *Natl. Terminals Corp.*, 139 F. (2d) 853 (C. C. A. 7).

The trial court has in fact found that petitioners required longshore work "practically around the clock, day in and day out, except Saturday nights" (find. 34, R. 610). One petitioner employed gangs "exclusively on night work"; the other assigned its gangs "either to day or night work as shipping exigencies required"; and "the gangs frequently commingled day work with night work on different days in the same working week" (find. 34, R. 610). Obviously the men were called to work in gangs, days or nights, or carried from day work into night work, dependent solely upon "the uncertainties of maritime, shipping and weather conditions, and the unpredictable character of ship and overland cargo arrivals, and the

[64] The opinion was in response to an inquiry as to construction of collective agreements with dual rates, for different times of day and days of the week, closely resembling the Great Lakes longshore contracts. Wage & Hour Manual (1944-45 Cum. Ed.), p. 227. Cf. *I.L.A.* v. *Nat'l Terminals Corp.*, 50 F. Supp. 26 (E. D. Wis.); Pl. Ex. 18 (R. 559-61).

[65] See chart (find. 40, R. 613), set out in Appendix, this brief; affid., motion for new trial, tables 3-4, exs. B-2 and B-3 (R. 641-2). See also discussion of evidence above, pp. 28-35, *supra*.

use of the 'shape' as a hiring device" (find. 14, R. 598-9; see also find. 19, R. 601; finds. 34, 36, R. 610). The men were, under their collective agreement, "obligated to work any night of the week or on Sundays, holidays or Saturday afternoons, when directed" (find. 20, R. 601). It was "not unusual" for them to start their work on a ship at night, or on Saturday afternoon or Sunday (find 46, R. 616). And the so-called "basic working day" and "basic working week" established by the contract were "not the working day or working week, normally, regularly or usually worked by plaintiffs" (find. 45, R. 615) or other longshoremen (find. 35, R. 610).

These were the same considerations which led to the Administrator's opinion that, because of the "vagaries of the stevedoring business" which "may require an employee to work any hour of the day or night," extra compensation paid for hours outside the "basic working day" as established by collective agreement in that industry, although contractually defined as "overtime", is not overtime within the meaning of the Act. The Administrator accordingly took the position that the so-called "overtime" rate established in the longshore agreements is "simply a higher rate of pay to the employee for working during inconvenient hours".[68]

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[68] Letter of L. Metcalfe Walling, Administrator, Wage and Hour Division, to Vernon Williams, Cleveland Stevedore Co., May 14, 1943, which is part of the record here (Pl. Ex. 18, R. 559-561). Defendants sought to infer contrary effect of a much earlier letter of a Regional Director. But this was received subject to subsequent showing of his authority to render such opinions, which defendants never produced (Def. Ex. N, R. 576-7; R. 540-1). Further it does not appear that this opinion involved the longshore industry.

The Administrator's view is obviously that of the Cleveland Stevedore opinion. That he cannot now reiterate it here flows from the inhibition placed upon his participation as *amicus* by the Attorney General's appearance for the defense (Def. Ex. O, R. 580). Notwithstanding, the administrative view has been made abundantly clear. See pp. 53-5, this brief, *infra*.

Also in accord are the opinions of recognized authorities who have studied extensively the problems of the longshore industry. Thus, in speaking of the "8-hour day" and "44-hour week", which pertained contractually here, theoretically, notwithstanding the 40-hour standard provided under the Act, Boris Stern, recent head of the Labor Information Service of the Bureau of Labor Statistics, U. S. Department of Labor, had the following to say: [67]

> All major ports in the United States have definitely established rules pertaining to the hours of work and the rates of wages for longshoremen engaged in foreign and intercoastal shipping. Theoretically the 8-hour day and the 44-hour week has been accepted as the standard for longshore work, but in practice longshoremen are called upon to work at any hour of the day or night, depending on the hours of arrival and departure of ships. *The rate of wages, however, is determined by the time during which the actual work of loading and discharging is performed.* * * * There is no such thing as "regular hours" in the longshore industry. Even when the workers "shape" regularly only once or twice a day, the *hour of "shaping" has no direct bearing on the actual hours of work.* (Emphasis supplied.)

Father Edward Swanstrom, recently head of the Overseas Service of the Catholic Charities of the Archdiocese of New York, reached the same conclusion in his survey of waterfront labor conditions: [68]

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[67] Stern, pp. 68, 72-73. See also U. S. Dept. of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, July, 1943, p. 134: "Schedules of daily hours are specified in the longshore agreements, and work outside these hours is paid for at the overtime rate. Where such work is not actual overtime, this becomes a night differential at a rate which is much higher than is paid in most other industries." Obviously it would be "actual overtime" only when paid for work exceeding a normal and regular work day or work week, measured by the standards here discussed.

[68] Swanstrom, p. 26.

> Although there are three definite hours at which the men are expected to shape when a ship is in at the dock, in reality the longshoreman may be hired at any hour. There is a morning call at 7:55 A. M., another at 12:55 P. M., and if night work is required a third call at 6:55 P. M. These calls follow the more or less theoretical understanding that the longshoreman's working day is from 8 A. M. to 12 noon and 1 P. M. to 5 P. M. In practice, the longshoremans' working day more often is arranged to suit the demands of the ship. He may be hired and discharged at any hour. Gangs may even rotate to provide for a continuous movement of the cargo during the stipulated lunch and dinner hours. *The unions have worked out an agreement with the shipping companies whereby a higher rate of pay is granted for the use of labor outside the hours of the stipulated working day.* (Emphasis supplied.)

Manifestly, the normal and regular workday of employees regularly assigned to night duty and *never, in fact, actually performing any work during the daytime hours,* cannot be determined by the "basic working day" as defined in a collective agreement. Since they never work such hours at any time, it would be grotesque to regard them as their "regular" and "normal" working hours. It is equally grotesque to contemplate, as the effect of petitioners' contentions here, weeks when a man works *nothing but overtime* (find. 43(b), R. 615). The "regular rate of pay" at which night men are employed is obviously the rate at which these men are always paid for the night hours which they always work. The contractual designation of this rate as an "overtime" rate does not control. Equally strange is the effect of petitioners' contentions where a longshoreman's straight time *follows* his overtime. Thus, a man, after working 40 hours at the contractual "overtime" rate, that is $1.87½ for each hour, on the first five days of the calendar week, comes to work Saturday morning and is paid only $1.25 per hour for the 41st through 44th hours actually worked that week (find. 43(c), R. 615)!

Obviously all these payments, as the "actual facts" appearing in the record and findings disclose, are payments at the "regular rate" and no part of them is statutory overtime. See *149 Madison Ave. Co.* v. *Asselta*, 331 U. S. 199.

There is another reason why the higher rates paid under the longshore agreement are not true statutory overtime. This was first made clear by an interpretation of the Wage and Hour Division as to the nature of payment of night rates approximating one and a half times the prevailing day rates in the case of (1) employees who worked only at night; (2) others who alternated on day shift and night shift; and (3) still others who worked principally during the day but also for awhile at night. The opinion concluded:[69]

> While, in the normal case, the payment of a premium rate for night work to one who has also performed day work for that day is evidence that the premium is overtime, a different result obtains here because it appears that the premium compensation would have been paid even in the absence of the performance of day work by the employee on that day.

It is clear from the petition for certiorari here (Pet., p. 25) that the Administrator agrees that the Second Circuit, upon the facts found by the trial court, gave "proper con-

[69] This opinion appears in full in the record (affid., motion for new trial, ex. A, R. 635-9). The interpretation is that of the Chief of the Wage-Hour Section in the Wage and Hour Administrator's national office, charged with advising the field staff throughout the country in pending matters requiring legal construction, made available through release of the Office of the Solicitor of the Department of Labor in Washington on July 31, 1946. The opinion advised one of the Administrator's Regional Attorneys in a pending investigation involving a lithograph company reproducing material for the Government Printing Office.

Even had this administrative opinion not recognized that it embraced "questions analogous to those involved in several cases concerning stevedores (now in litigation)" (R. 636), the analogy would be apparent.

sideration * * * to his interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct". Petitioners' brief does not repeat this statement but, since the filing of the petition, the Administrator has taken the opportunity to repeat these views and to amplify them by setting forth the basis for his reasoning. Thus, in hearings before a subcommittee of the Committee on Education and Labor of the House of Representatives, when interrogated with reference to these very cases, he stated:

(1) Mr. McComb. I will go on the record here that I still think we could say that the circuit court was correct in its facts. I would much have preferred to send it to the Supreme Court without any interference and just let them make the decision. Nevertheless, if called upon, I would say that I think the facts, as submitted, are correct and that the court's decision was correct.[70]

(2) Mr. McComb. * * * I just think the contention that it was overtime is not correct; it is not overtime. It was the regular rate of pay, and that was the principal question in this case.[71]

(3) Mr. MacKinnon. Why would not that apply to all of these collective bargaining contracts in the country that provide for straight-time rate and overtime rate?

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[70] Hearings before Subcommittee No. 4 of the Committee on Education and Labor, House of Representatives, 80th Congress, First Session on bills having for their object the raising of the minimum wage standards of the Fair Labor Standards Act of 1948, Vol. 2, Part 23, Nov. 20, 1947. The official transcript is now available at the Government Printing Office only in galley proof. This excerpt is from galley "30BS".

The testimony is that of William R. McComb, Administrator, Wage and Hour and Public Contracts Division, U. S. Department of Labor. The chairman of the subcommittee is Representative McConnell of Pennsylvania; counsel is Irving McCann.

[71] Hearings before Subcommittee No. 4, Vol. 2, Part 23, Nov. 20, 1947. This excerpt is from galley "30BS".

There is a difference, Mr. MacKinnon. When you say, and I was waiting for you to say it, when you say why would it not apply, after you get the 40 hours, at the overtime rate, and the reason is just this, as I say, this was not an overtime rate. This was a rate for working after 5 o'clock, which any man could get; he did not have to work overtime. I do not see how we could rule that anybody coming in, who had not worked during the regular hours, but who gets the same rate of pay if he works after 5 o'clock, I do not see how we could say that was an overtime rate.[72]

Mr. McComb.

(4) * * * In this case, I do not believe it is legitimate overtime pay. We find it is a completely separate rate paid out under the contract for the part of the work after 5 o'clock. And no man has to work overtime to get that, and I think that is terribly important.[73]

Mr. McComb.

(5) You testified that you considered the so-called overtime in the longshoremen's contracts not to be true overtime because it is payable to an employee who comes to work at 5 o'clock, even though he has performed no work previously on that date. That is correct, is it not?

Mr. McCann.

That is right.[74]

Mr. McComb.

On the facts found by the court below, the Second Circuit's decision that the higher rates paid for Saturday, Sunday and holiday work were not true statutory overtime but merely the "regular rate of pay" for work per-

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[72] Hearings before Subcommittee No. 4, Vol. 2, Part 24, Nov. 21, 1947. This excerpt is from galley "4CR".

[73] Hearings before Subcommittee No. 4, Vol. 2, Part 24, Nov. 21, 1947. This excerpt is from galley "5CR".

[74] Hearings before Subcommittee No. 4, Vol. 2, Part 26, Nov. 25, 1947. This excerpt is from galley "9HH".

formed on those days was correct. We have already seen that, in the Administrator's view, the Circuit Court correctly applied the statute to the facts involved in the light of his written interpretations.

Petitioners have referred to the doctrine that where there are concurrent findings of two lower courts, they should not be disturbed (Pet. Br., p. 5, note 4). As the Second Circuit noted: "In the instant cases, on the facts disclosed in the findings[75], the hours worked on Saturday afternoon, Sundays and holidays were surely not

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[75] The court referred particularly to findings 19, 20, 34, 35 and 46 set out in the Appendix to Judge Frank's opinion [162 F. (2d) 665, 670-673]. The pertinent portions of these findings read as follows:

No. 19: The amount of work which may be available for longshoremen in the Port of New York, and the time of the day or the day of the week when such work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week, and season to season.

No. 20: Under the terms of the Collective Agreement in effect during the period in suit, and under previous Collective Agreements in effect over a period of many years, the longshoremen in the Port of New York have been obligated to work any night of the week or on Sundays, holidays or Saturday afternoons, when directed, with special limitations on Saturday nights.

No. 34: During most of the period in suit the defendants required some longshore work practically around the clock, day in and day out, except Saturday nights.

No. 35: No stevedoring company worked exclusively from 8 a. m. to 5 p. m. and Saturday mornings.

No. 46: During the period in suit, it was not unusual for the plaintiffs, in their employment by defendants, to start their work on a ship at night rather than by day, and it was not unusual to start their work on Saturday afternoon or Sunday.

To these may be added the following:

No. 44: During the period in suit, the plaintiffs, if they so desired, worked Sundays and Holidays whenever work was available to them, just as any other day.

No. 45: The "basic working day" and the "basic working week" referred to in the Collective Agreement were not the working day or working week normally, regularly or usually worked by plaintiffs during the period in suit.

'outside normal or regular working hours' " [162 F. (2d) 665, 669]. Certainly, it cannot be said that these findings were clearly erroneous or unsupported by the evidence.

Thus, the "actual facts" as to the working conditions of these respondents disclosed that it was normal and customary for them to try to get work, and to work when they could obtain it, on Sundays and holidays, as well as Saturday afternoons[76], just as on any other day of the week. There was no conflict in the testimony on this point. The men shaped for work on these days, just as at any other time, successfully obtained work then about as often as any other day and were frequently called out in gangs for work on such days. Not only did they often start loading a ship on Saturday afterooon or Sunday, but that might be the only day of the week when they could get work. Finally, as their contract reveals, they were obligated to work on Saturday afternoon, Sundays and holidays when, in view of shipping exigencies, the employer required such work.[77]

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[76] Quite obviously appearing from the work records of the employees in these suits also is the fact that it was customary and normal to work *both* Saturday morning and Saturday afternoon where a man worked at all that day, and that the men rarely worked only on Saturday morning. The percentage of instances of men working forenoon hours and not after proved to be only about 6%.

Saturday work instances of 65 longshoremen, including the 10 selected plaintiffs here, in the Huron case, compiled from data submitted before trial by that defendant to respondents: Before 12 noon only, 8 instances; *before and after* 12 noon, 72 instances; after noon only, 46 instances; definitely afternoon and possibly before noon also, 14 instances (total, 140 instances). The same data could not be compiled for Bay Ridge employees because the record transcriptions supplied by that defendant did not show breakdown of hours as between days of the week. As to the 10 Huron employees who are respondents here, see Pl. Ex. 7.

[77] See references to the testimony, this brief, pp. 29-34, *supra*. See also affid., motion for new trial, table 3, Ex. B-2 (R. 641), indicating even distribution of work instances on the different days of the week, including Saturday and Sunday, in the case of 64 longshoremen plaintiffs in the *Huron* case.

Further, the historical development of the dual rate system prevailing in the longshore industry in New York discloses that the collective agreements have merely carried on a practice apparent before the introduction of collective bargaining in the industry.[78] That practice was the payment of higher rates as an inducement to workers to report for shape-up on days of the week or year customarily spent by other people at home with their families, or in personal recreation or relaxation. In the absence of such higher rate payments, the men would characteristically fail or decline to turn out for work at those times, although, because of the vagaries of shipping and cargo arrivals and the unpredictability of maritime conditions, such work was essential if ships were to be unloaded and reloaded upon arrival in port and sailing schedules met. *Cf. Cabunac v. Natl. Terminals Corp.*, 139 F. (2d) 853 (C. C. A. 7).

We are quite aware that, in his letter of May 14, 1943, discussing the Cleveland Stevedore Co., the Administrator, while recognizing the non-overtime character of the night rates, said that "overtime compensation for Sunday or holiday work • • • may be credited toward overtime due under the Act" because it "can be regarded as time outside the employee's normal working time" (Pl. Ex. 18, R. 561). But this merely underlines the Administrator's view that the result depends upon the facts.[79] Further, as the Second Circuit here noted [162 F. (2d) 663, 669], "we must consider also the following":

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[78] This brief, pp. 20-27, *supra*.

[79] Under the agreement covering longshore operations in the Port of New York between 1943 and 1945, the obligation imposed by the contract to work Saturday afternoons, Sundays and holidays when called upon is equal with the obligation to work at night under similar circumstances. See par. 2 (a), of the New York agreement effective Oct. 1, 1943 (Def. Ex. A; find. 20, R. 601). The Cleveland Stevedore Co. contracts, on the other hand, did not encompass an obligation on the part of the employees to work on Saturday afternoons, Sundays and holidays (Pl. Ex. 18, R. 561).

(1) The day after that letter of May 14, 1943 was written, Judge Duffy held the contrary; see International Longshoremen's Association v. National Terminals Corp., D. C., 50 F. Supp. 26, affirmed in Cabunac v. National Terminals Corp., 7 Cir., 139 F. (2d) 852. (2) In an opinion published in the Wage and Hour Manual, 1944-1945 Cum. Ed. page 227, the Assistant Solicitor referred to a previous ruling, in the Administrator's Interpretative Bulletin No. 4, that an employer might consider "as overtime compensation" extra amounts of compensation paid "for hours worked outside the normal or regular working hours"; the opinion said that such extra compensation might be considered overtime compensation only if the "hours compensated for" were "hours not normally worked by the employees" giving as an example "work on Sundays, holidays, or at a time of day when the employee does not normally work"; the opinion, however, went on to explain that "hours worked on Sundays and holidays are generally outside the 'normal or regular working hours'."

We have already seen that hours worked at night, and on Saturday afternoons, Sundays and holidays, under the facts of the present cases, were not "outside the normal or regular working hours". It follows that the night, week-end and holiday rates were not statutory overtime but were respondents' "regular rate of pay" for hours worked in those periods.

III

As the Government has successfully contended in prior litigation, true overtime must be related to a standard of excessivity of hours worked over a certain number, usually or regularly worked by the particular employee.

The position of the Attorney General in this litigation is unique. In the first place, he is defending in behalf of the War Shipping Administration suits against private

litigants (cf. Pet. Br., pp. 1-2, note 1). Secondly, the intervention of the Attorney General in this litigation has embarrassed the Wage and Hour Administrator, who commonly represents the public interest in such suits by employees or makes his opinion known as *amicus curiae*.

These cases have yet another unusual aspect. The Attorney General here takes a position contradictory to that advanced by the Government and sustained by this Court in prior litigation. *U. S.* v. *Myers*, 320 U. S. 561 (1944), decided that overtime must be related to some standard of excessivity over a fixed number of hours usually or regularly worked per day or per week by the particular employee, as the Government there asserted. That case construed a statute[80] providing:

> The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of * * * customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays * * *.

The suitors there, inspectors assigned in rotation to regular night tours of duty in order to provide the 24-hour coverage necessary in the Port of Detroit, claimed under the language of the statute (sounding as does the language of the collective agreement here in terms of "overtime" for any work outside of specified "clock hours") "overtime" compensation when employed on night shift and working no daytime hours. This Court held:

> When we examine the language of Section 5, * * * we find convincing authority to support the Government's view as to the meaning of overtime. "Overtime" as we pointed out above was substituted by the 1920 amendment of Section 5 for "nighttime" serv-

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[80] 41 Stat. 402, c. 61; 19 U. S. C. § 267, Sec. 5.

ices.[81] The section requires employees to "remain" on duty. The usual instance of the payment of extra compensation would be for work after 5 P. M. by an inspector who had previously worked full time. The Government is correct in its interpretation of the last proviso of Section 5 as permitting shifts in an inspector's regular hours of work. Night assignments are an old administrative practice. * * * *We are led to the conclusion that overtime, as applied to week days, refers to hours longer than the daily limit of 8 A. M. to 5 P. M., nine hours with one hour for food and rest.* (Emphasis supplied.)

The Court concluded that extra overtime compensation under the statute was payable only for "'overtime services in the sense of work hours in addition to the regular daily tour of duty [that is, 8 hours] without regard to the period within the twenty-four hours when the regular daily tour is performed." Extra compensation for Sundays and holidays, however, was to be paid (as here in practice) "without regard to whether services on those days were overtime."

The Government, in its brief to this Court in the *Myers* case, said the following:[82a]

> The term "overtime" in its usual and generally accepted sense means, "extra working time"; that is, working time in addition to the regular time normally devoted to work.*
>
> * One who works more than the usual number of hours per day is said to work overtime. *Cote* v. *Bachelder-Worcester Co.*, 85 N. H. 444, 447. "Overtime," according to Webster's New International Dictionary, is "Time beyond, as in excess of, a set limit; esp., extra working time." And according to the Oxford Dictionary the term means "Time during which one works over and after the regular hours; extra time."

The historical background of the statutory provisions involved in the *Myers* case (cf. find. 38, R. 611-2; R. 440-51),

[81] Cf. changes in the contractual nomenclature here, pp. 26-7, *supra*.

[82a] See Pet. Br., Nos. 142-145, Oct. Term, 1943.

indicates the parallel of "clock hour" designation as between the provisions affecting customs inspectors and those affecting longshoremen under their collective agreements. That decision, therefore, supports respondents' contention that, regardless of "clock hour" designation, true overtime must relate to a standard of excessivity of hours over a fixed number of hours normally, usually or regularly worked.

IV

Petitioners' contentions do not warrant disturbance of the Circuit Court's determination.

A. The criteria adopted by petitioners' expert witnesses for distinguishing overtime from shift premiums were inconstant, inconclusive and not in accordance with sound economic authority.

We urge at the outset that, in weighing the effect of petitioners' expert testimony and statistical surveys, the Court is completely free to reach its own conclusions, regardless of Federal Rule 52(a). The trial court received such matter only as argument and not as evidence.[82] Accordingly, in relying upon such testimony even to the extent of incorporating it in findings (find. 28, R. 604-6; find. 39, R. 612), the trial court could not properly have dignified this material above the limited purpose for which it was originally received. We are thus free to demonstrate not only that the testimony of the experts was inconstant and inconclusive but that it was contrary to economic facts of common knowledge, attested to by recognized authorities.[83]

Prof. Taft and Dr. McCabe gave testimony (cf. Pet. Br., pp. 32-8) over objection, that—

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[82] See references, this brief, pp. 8-11, *supra*.

[83] On the point of law see 9 Wigmore *Evidence* (3rd ed.) § 2567 (c). See also *Shapleigh* v. *Mier*, 299 U. S. 468, 474-5.

(a) overtime as developed historically through collective agreements in American industry is a premium intended to inhibit work either in excess of a limited number of hours or outside a specified pattern of clock hours;

(b) the prevailing relation between straight time and overtime rates in American industry is generally 150%;

(c) The customary range or extent of shift differentials in American industry is usually 5 or 10 cents per hour, or 5% to 10%, and seldom in excess of 15 cents per hour;

(d) a shift differential is designed to induce work during hours outside the basic shift, while overtime is designed to inhibit work by placing a deterring financial burden upon the employer;

(e) the "overtime hourly rate" in the longshore industry in the Port of New York is true overtime as industrially understood and not a shift differential. [R. 325-7, 330-4, 337-8, 419-20, 425, 426-7, 433-6, 438].

Two criteria were thus stated: (a) the purpose of the premium to induce or to inhibit night work; (b) the size of the premium (cf. Pet. Br., pp. 32-5, 37-8).

These criteria were applied by the experts to the longshore industry in a manner somewhat less than scientific. There had been testimony that numerous factors inhibited night work in addition to the higher rate of pay. Thus:

(1) Workers cannot see as well at night;

(2) Movement of harbor lighters is delayed;

(3) A man's vitality is low after midnight;

(4) On the whole, work output is substantially diminished;

(5) And, finally, the extremely high accident rate prevailing in this industry is certainly not diminished

by the poor vision and low vitality at night. [R. 57, 150-2].[84]

The trial court in fact found that "overtime work is less efficient than work in 'straight time' hours" (find. 26, R. 604). Undoubtedly, the foregoing factors affecting efficiency had more pronounced effect than the spread in rates in limiting the amount of night work.[85] Yet the experts made no effort to eliminate these other coexisting factors from the inhibitory tendency which they professed to find and to isolate the rate differential as the sole responsible cause. Under the circumstances there was no scientific foundation for their conclusion.

Prof. Taft likewise professed to discover inhibitory effect in the result of defendants' statistical surveys (R. 384-5). He apparently understood the incidence of night work to be about 17% in longshoring and regarded this as a proportion adequate to demonstrate an effective inhibitory function in the premium rate (R. 385). By coincidence, the ratio of night shift employees to total employees on all shifts in industrial plants pursuing rotating night shift operations without "punitive overtime" is just 17%![86]

Further, appropriate scientific approach is absent from a test which assumes that a purpose to inhibit overtime may operate freely or capriciously, without reference to economic factors. Obviously, in the realm of economics the necessary effect is more important than any pure volitional purpose. In the economy of the longshore industry,

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[84] National Industrial Conference Board, *Night Work in Industry* (1927), p. 34, indicates 11% greater frequency of accidents on night shifts than during the day, in a representative group of industries. Cf. U. S. Bureau of Labor Statistics, *Injuries and Accident Causes in the Longshore Industry*, Bull. No. 764 (1942), indicating that the injury rate in the longshore industry far exceeds that in any other American industry.

[85] Lower efficiency and output of night forces is well known in industry generally. See *Night Work in Industry*, p. 40.

[86] See *Night Work in Industry*, p. 8.

the effect of the premium payment was not in fact to restrict night work. Financial disadvantage to the steamship companies could only have resulted from failure to work during the contractual "overtime" periods when pecuniary self-interest dictated. To point to the fact that the stevedores did not make money in work outside the basic day begs the question, for they could work "overtime" only with permission of the steamship company. The inquiry must therefore be addressed to the ratio of additional overtime cost to the cost of the steamship operations. [Cf. find. 22, R. 602; find, 26, R. 604]. The extremely high rate of port cost—no less than $2,000 to $4,000 for each day a cargo ship is kept in harbor—makes it apparent that it is usually financially desirable to work at night in order to get a ship out and avoid additional port charges.[87] The trial court recognized this, for it found:

> "The decision whether to work 'overtime' was controlled by the necessity of meeting scheduled sailing dates in the case of passenger liners, and otherwise by financial considerations turning on whether the overall cost of a later departure exceeded the cost of 'overtime.'" (find. 22, R. 602).

Further, it appears only that "stevedoring companies never worked 'any more overtime *than was necessary*'" and "steamship companies in the Port of New York have preferred to confine the handling of cargo to 'straight time' hours *to the greatest possible extent*" (finds. 22, 25; R. 602-3). Since it is apparent that plans for the handling of cargo on any vessel would have to be "readjusted from time to time on account of delayed arrival (of the ship), necessity for repairs, delay in arrival of outgoing freight, weather conditions and other factors" (find. 22, R. 602), the deterrent effect of the premium rate is obviously limi-

[87] MacElwee and Taylor, *Wharf Management, Stevedoring and Storage*, pp. 2-8. See also E. H. Lederer, *Port Terminal Operation* (1945), pp. 129-130.

ted in scope. Nor could premium rates deter stevedoring companies, which were reimbursed for the additional wages, plus insurance and Social Security tax (find. 26, R. 603-4).

The upshot of the matter is that, both in actual practice and from the point of view of stevedoring economy, the overtime rate could not operate as a pure deterrent. We shall deal presently with the undependable character of the statistical surveys upon which the expert witnesses relied for their conclusion that the 50% premium has deterred. Even these surveys admitted a consistent incidence of 20 to 28% night, Sunday and holiday work in the Port of New York in peacetime years (Def. Exs. D-E), rising to 45% during the war (Def. Ex. J)."[38]

The language in which Mr. Ryan expressed the union's fundamental purpose in insisting upon a higher rate for night, Sunday and holiday work, casts an additional shadow upon the experts' testimony. Mr. Ryan attested to the objective "to have the work done in the day time as much as possible" and "to make night work so expensive that they would work in the day time" (R. 173, 180, 186, 188-9; find. 22, R. 602). This contemplates no deterrent against working *long* or *excessive* hours; it merely reflects the natural human desire to work by day and retire at night. But petitioners, following the line of their experts' testimony, urge that overtime as understood in American industry has always included, as an alternative concept, hours outside a basic clock pattern (R. 326-7; 425-6; cf. find. 28, R. 604-5; find. 39, R. 612; Pet. Br. pp. 36-7). Further, they have made reference to some 20-odd industries

[38] The strong possibility that the statistical surveys prepared for petitioners understated the "overtime" appears from the fact that even in a decasualized port such as San Francisco, between 40 and 50% of the hours worked were "overtime", even in peacetime. Marvel Keller, *Decasualization of Longshore Work in San Francisco*, Works Progress Administration, National Research Project, Report No. L-2 (1939), p. 107; Richard A. Lester, *Economics of Labor*, p. 201.

in which there are "contracts establishing workday limitations by reference to clock-hour schedules" (Pet. Br., pp. 58-9).

Prof. Taft stated on cross-examination that of some 300-odd contracts he had examined, only 20 had an overtime clause applicable to specific hours (R. 384, 389); and all of these (with the obvious exception of the Atlantic Coast longshore industry) appear to have *combined* the two concepts of excessivity and abnormality of clock hours:

> "The two concepts were usually joined together. * * * You might find that the overtime provisions were defined as hours in excess only. Then you may find, again, that the overtime, was defined as hours in excess and also as applicable to specific hours.
>
> "Q. Did you ever have the second without the first?
>
> A. I do not recall it, sir" (R. 327).

As a matter of fact virtually all collective contracts include excessivity as an essential element in the computation of overtime." And this is the similar indication both

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" Petitioners have collected references to 20 industries in which they profess to find the workday limited "by reference to clock-hour schedules" and "overtime rates" paid for work "outside such limits" (Pet. Br. pp. 58-59). Intimating that the collective agreements in these industries provide for such overtime without regard to excessivity, they fear "a condemnation of such wage-patterns" will "invalidate widespread contractual arrangements in many industries". But, unlike the Atlantic Coast longshore contracts, virtually all the agreements cited have provided overtime only for work *beyond or in addition to hours regularly worked.* Petitioners have intimated otherwise only because they have inadequately examined the authorities and inaccurately stated their effect.

For example, *Union Wages and Hours in the Printing Trades,* July 1, 1945, B.L.S. Bull. No. 872, p. 13, reported that: "Practically all the organized workers in * * * the industry received an initial overtime rate of time and a half for work beyond the contract hours." And in the petroleum refining industry, "all except 3 of the 21 agreements" surveyed required "payment of time and a half after 8 hours per day or 40 hours per week". *Union Agreements in the Petroleum-Refining Industry,* B.L.S. Bull. No. 823, p. 6. The same

of the precursor statutes to the Fair Labor Standards Act in the regulation of hours and of the economists who have defined the term."[90]

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is true of collective agreements in the coal and metal mining industries. See *Tenn. Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 609-611. Similar examination of petitioners' other references (Pet. Br., p. 59, note 20) discloses virtually no other industry where contractual "overtime" pay is based merely on work outside a pattern of "clock hours" without reference to any standard of excessivity. Curiously enough, two of the industries to which petitioners allude are the building trades and motortruck transport (B.L.S. Bulls. Nos. 910 and 874, respectively). But new construction is not covered by the Fair Labor Standards Act [*Noonan* v. *Fruco Construction Co.*, 140 F. (2d) 663 (C. C. A. 8); *Barbe* v. *Cummins*, 138 F. (2d) 667 (C. C. A. 4)]; and truck drivers and helpers are specifically exempt from the overtime provision of Section 7 (*Bayley* v. *Southland Co.*, 319 U. S. 44).

Petitioners have stated that contractual "overtime" solely on a "clock hour" basis prevails in 10 industries *cited in Premium Pay Provisions in Selected Union Agreements*, 65 Monthly Labor Rev. 419, Oct. 1947 (Pet. Br., p. 58). But petitioners have apparently misread the authority. *Ibid.*, p. 424. As to Pacific Coast longshoring, cf. the contractual "overtime" there, which relates to a standard of excessivity. And in the men's clothing industry overtime over 40 hours is either flatly forbidden, or compensated on an excessivity basis as is the case in shipbuilding. *Ibid.*, p. 420.

Finally, it should be noted that penalty rates for hazardous, dirty or unpleasant work are well known in the longshore, shipbuilding and paper industries and that they frequently run as high as 150% of the base rates in these industries without regard to the number of hours previous, or the time of day when the work is performed. *Ibid.*, p. 424. See also Pet. Br., pp. 56-7.

[90] See the various 8-hour laws cited in Pet. Br., pp. 32-3, note 14, all of which refer to hours "*in excess*" of 8. Statutes such as those designed to regulate overtime of customs inspectors patterned on a clock-hour basis, cited at the end of Pet. note 14, have been construed by this Court as operative only on an excessivity basis. See this brief, pp. 59-62, *supra*. As to the economists, see Millis and Montgomery, *Labor's Progress and Some Basic Labor Problems*, pp. 463-4; Brookings Institute, *The National Recovery Administration*, p. 372, for example; and cf. Pet. Br., p. 32, note 13. References there all speak of true overtime as "emergency" in character; it thus contrasts with the recurrent need in the longshore industry for "off-hour" work.

Next, we may note that the recognized unique character of the shape-up as a hiring device and the short-lived duration of the employer-employee relationship upon each fresh hiring in the longshore industry would, in any event, effectively vitiate the force of any comparison with contracts in other industries or with the function and character of overtime in American industry generally (cf. find. 14, R. 599). Moreover, the historical development of the hours and rates of pay in the longshore industry, to which we have already adverted, clearly indicates that the pattern of the collective agreements in the longshore industry in the Port of New York could not possibly, as the experts opined and the trial judge agreed (find. 39, R. 612), have "followed the prevailing pattern in organized American industry." On the contrary, the longshore pattern evolved chronologically much *before* the developments with which it was compared.

Thus, we have seen the night premium, as well as a third rate for Sunday and holiday work, moving up and down, dependent upon general business conditions, unilateral action upon the part of the shipping companies, lost strikes, resistance among the workers to night work, and we have seen also the variance of rates from pier to pier and period to period.[91] All this justifies the conclusion that the differentials were necessary to induce workers to turn out to shape and work at undesirable times of day and days of the week when they would rather be at home or enjoying leisure pursuits. It places great enough strain on the credulity to suggest that this unique pattern has been part of the general hours reduction movement. Petitioners' position becomes completely incredulous when it is seen that, while this pattern was evolving in the longshore industry in the Port of New York, the degree of

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[91] This brief, pp. 20-26, *supra*.

labor organization throughout the country along the lines we now know was negligible."

Prof. Taft's and Dr. McCabe's distinction between so-called "true overtime" and what was termed a shift differential was founded primarily upon the amount of spread between the base and the premium rates. The experts referred to the usual range of a shift differential as 5% to 10% above the basic hourly rate, or 5¢ to 10¢ and, rarely, 15¢ per hour. The highest shift differential Prof. Taft had known was one of 25% prevailing in the Pacific Coast lumber industry, which he dismissed as being founded upon unique circumstances (R. 333). Further, within his definition shift differentials existed only in continuous process industries or where orders accumulating were large enough to occasion the spreading out of the work over an additional shift (R. 334). When pressed to identify the criteria of overtime, he began with the amount of the premium over the base rate (R. 339). He at first indicated as an additional criterion use of the descriptive designation "overtime" in collective agreements (R. 340-1) but subsequently agreed that this was inconclusive (R. 350-1) and returned to "the amount or ratio" as the essential test; in effect a 50% premium appeared to him to establish a virtually "irrebuttable presumption" that the payment was overtime (R. 341, 354-5, 365).

In answer to inquiry from the bench, Prof. Taft maintained that the higher rates must be overtime in all the following purely hypothetical examples (R. 355-8):

1. Aviation night pilots paid $2 per hour for duty between dawn and dusk, and $4 per hour for night flights.

" Robert F. Hoxie, *Trade Unionism in The United States*, pp. 92-93; Lois MacDonald, *Labor Problems and the American Scene*, pp. 413-4; John Dunlop, *The Growth of the American Economy*, pp. 614-5. And note that of 169 national unions listed in Carroll R. Daugherty's *Labor Problems in American Industry*, table 29, pp. 351-7, only six antedated 1872.

2. Transcontinental railroad engineers paid $1 per hour for work from 8 a. m. to 5 p. m., $2 per hour for work between 5 p. m. and 3 a. m., $3 per hour for work from 3 a. m. to 8 a. m.

3. Seamen aboard ship paid 50 cents per hour for work from 8 a. m. to 5 p. m., $1 per hour for work between 5 p. m. and 8 a. m.

Yet where crews were *rotated* through the periods carrying the different rates, he thought he might then conclude that the *identical amounts* were shift differentials, provided there were actual shifts (R. 361).

Prof. Taft apparently based his judgment concerning the mathematical limitation as a distinguishing characteristic of the shift differential upon a survey of the War Labor Board orders and determinations during World War II (R. 376-9) and conceded that the shift differential in continuous process industries was a development of the two wars and the period between them (R. 333). But he recognized also both that the whole effort of the War Labor Board program, in line with the policy directives of the Economic Stabilization Director, was to limit wage increases in the interest of preventing inflation, and that the directives did not purport to disturb prevailing practices but merely to set up standards in disputes over new or increased rates, in the interest of inflation control (R. 373). Why a survey of the War Labor Board cases should establish a principle to determine the effect of a practice developed 60 or 70 years earlier and persisting all through the years since was never satisfactorily explained (R. 383-399). Completely confusing also was the following series of colloquies with the trial court:

(1) "Supposing you had a labor agreement which said that in order to inhibit work between the hours of 4 and 6 in the afternoon the rate shall be 110 per cent of the normal day's rate for those two hours; would you call [that an] overtime provision or a shift differential? A. A shift differential" (R. 355).

(2) "Suppose you had an industry which could well afford to pay $1.10 an hour but the men are only moderately organized, and the best they have been able to get from their employer is an agreement calling for a dollar an hour for the first 40 hours, and there is a provision that for all hours in excess of 40 the employer shall pay $1.10, that that is the result of a strike of 30 days duration, and finally that is what they agreed on. What do you call it then?

The Witness: I think that would be an overtime rate, providing of course * * * the increase in rate had an inhibitory effect or tended to have that. I believe with your example it would be an overtime rate" (R. 393).

It thus appeared that sometimes a 10% differential could become an overtime rate, dependent not on the contractual purpose at all, but only upon whether it actually tended to inhibit. The size of the differential as the touchstone for inducement or inhibition thus lost all significance. Conversely, no reason appeared why a 150% differential could not serve to induce as well as inhibit. Thus the inquiry ultimately relapsed into mere semantics.

When pressed, Prof. Taft conceded that a 30¢ difference between base and premium rates would approach the "twilight zone" between differential and overtime (R. 394-5). This choice of the point of middle ground presumably followed from his observation that he had never heard of a 50% shift differential and that the highest he knew was 25% (R. 332-3). The spread in the rates as the sole test becomes utterly ridiculous when it is seen that recognized shift differentials in excess of 25 or 30% are by no means unknown and that in fact they do occasionally reach 50%! Thus 31% appears in the shipbuilding industry,[93] 33%

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[93] U. S. Dept. of Labor, *Monthly Labor Review*, July, 1943, pp. 142-3—a 15% differential, plus 8 hours' pay for 7 hours work on third shift = 131% of the first shift base rate.

in the airframe manufacturing industry,[94] 35½% in the printing industry,[95] and 50% in motion picture producing.[96] On the other hand, it is quite clear that overtime prior to the leveling effect of the Fair Labor Standards Act varied in different plants and under different contracts from straight time or irregular lump sum payments, through time and one-quarter and time and one-third, to time and one-half or even double time;[97] and in industries composed of numerous small plants substantially unaffected by the Act, the free play of economic forces has continued to indicate a great range even subsequent to 1938.[98]

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[94] U. S. Dept. of Labor, *Monthly Labor Review*, August, 1944, p. 346—a 10% differential, plus 8 hours' pay for 6½ hours work on third shift = 133% of the first shift base rate.

[95] Leonard Drake, *Trends in the New York Printing Industry* (Table 26, Comparison of Commercial Contracts of Printing Unions on January 1, 1940), pp. 63-4—a rate of $1.846 per hour on third shift for cylinder pressmen in New York City = 135% of base rate of $1.362 per hour on first shift.

[96] Cal. Dept. of Indus. Rel., Div. of Labor Stat. and Law Enforce., *Night Work Differentials in Union Agreements in California* (1942), p. 23, table 11—premium above day rate for fourth shift = time and one-half (150%) straight-time base rate payable on three previous 6-hour shifts. See also *Night Work in Industry*, pp. 23-4—indicating night shift differentials as high as "50% extra" on temporary fixed night shifts.

[97] *The National Recovery Administration*, p. 369—of 174 instances of overtime rates analyzed under the NRA prior to passage of the Fair Labor Standards Act, about 50% showed time and one-third and 50% time and one-half rates, respectively; National Industrial Conference Board, Service Letter, March 31, 1937—of 349 companies analyzed with uniform overtime rates of pay the rate was straight time in 131 instances (37½%)—time and one-third in 56 (16%)—time and one-quarter in 6 (1.7%)—time and one-half in 108 (31%) and double time in 2 (6%). *From this it quite clearly appears that it is only the Fair Labor Standards Act that has brought about since 1938 the significance of 150%.*

[98] See *Handbook of Labor Statistics* (1941 ed.), Vol. II, p. 36, covering the bakery industry, for example.

To explain away the disturbing coincidence in the "twilight zone" the experts ultimately merely *revised their definition!* Now it relates not only to the amount of the spread, but also to the existence of "regularly established shifts of fixed duration" (Pet. Br. p. 34; cf. R. 332-4, 356, 368-9, 426-8). The conclusion is inescapable that the tests suggested were designed to successfully exclude the longshore night rates from the realm of shift differentials and to place them in the realm of true overtime as defined. Prof. Taft had admitted that if the longshore contracts were changed in only one particular, namely the three shapes a day were contractually designated as fixed shifts, with $1.25 paid on the first and second and $1.87½ paid on the third or night shift, despite the spread, he would be compelled to conclude that the 150% rate was a "shift differential" (R. 413-7). But it is obvious that the shape varies from a fixed shift in factories only in the manner dictated by the casual hiring and uncertain duration of employment in this industry. And there has been no particular disposition by disinterested economists to regard it as other than a shift of somewhat unique character."[99] Repudiating the testimony of its own economist, that their novelty impelled against the conclusion that longshore shapes are shifts (R. 368-9), petitioners have in their present brief conceded that there *may* be shifts in the longshore industry, *at least* on the Great Lakes.[100] Thus a 10¢ differential between day and

[99] Keller, Appendix B, p. 107. At least one of the petitioners economist witnesses spoke of the shape as a "shift" (R. 248). See also U. S. Dept. of Labor, Monthly Labor Review, July 1943, p. 136, Table 2, footnote, indicating that the Bureau of Labor Statistics has classified premium pay for "work between specified hours such as 6 p. m. to 6 a. m." under "One Differential for Night-Work."

[100] Petitioners refer to the "overtime" rate in *ILA* v. *Natl. Terminals Corp.*, 50 F. Supp. 20, affd. 139 F. (2d) 853 (C. C. A. 7) as a "shift differential", thus apparently conceding that shift operations

night longshore rates (actually 17% above the base rate) in Milwaukee is a shift premium, but in the Port of New York, where there long ago developed an endemic 50% difference, no part of the premium is to be deemed necessary to induce night workers to turn out under similar conditions!

Equally incredible is the suggestion that a 10¢ differential to second or third shift workers in rotating shifts is designed as an inducement to get them out to work. On the contrary, practical considerations make it apparent that the swing shift worker is not *induced* to work, he is told when and where his shift is to report, if he wishes to work. He makes his choice on the inducement of his basic rate, not the premium he is given for his inconvenience. It is the $1. that induces him to come out, not the 10¢ additional. Or, as Prof. Taft reluctantly agreed, it is the average of the various rates at which he may be employed over a period of time, which he comes to recognize as contributing to his normal "take-home" pay. Thus it appears that where a powerful union wishes to use a 50% night premium as a device "for actively increasing the normal day's pay", including both day and night work, in one shift, or anticipating their average on rotating shifts, we have to deal then neither with a shift differential nor with true overtime, but with a "higher normal rate" (R. 366-7).[101]

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exist in the longshore industry (Pet. Br., p. 71, note 24). However, the conditions under which longshoremen worked on the Great Lakes are no different from those in the Port of New York. See Boris Stern, *Cargo Handling and Longshore Labor Conditions*, U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 550. Further, petitioner now concedes that shifts might possibly have been "present in the New York longshore industry * * * in the case of some stevedoring companies during the war years" (Pet. Br., p. 35).

[101] Cf. Philip Taft, *Economics and Problems of Labor*, p. 339; and see the Administrator's opinion in the *Consolidated Vultee Aircraft Corp.* case set forth in full in the record here (Pl. Ex. 19, R. 561-6). See also note 46a, p. 25, *supra*.

From all the foregoing the inference is inescapable that longshoremen are paid a 50% premium for turning out for work nights, because of the general undesirability of night work, exposure to adverse weather conditions and a high rate of hazard, and they will not turn out without great incentive. Likewise, if a man misses a job on a shape at 8 a. m., he may yet make one at 1 p. m., or he may be ordered back at any one of a half-dozen times between 8 a. m. and 3 p. m., in anticipation of a ship arrival or cargo availability; but if he misses a shape at 7 p. m., his time goes completely unrewarded (R. 76-81; 497-505). The need of the high incentive is thus inherent in the peculiar character of the hiring device, the high accident risk and the casual nature of the employment relation. Prof. Taft himself recognized the effect of "special dangers to . . . health" and high "accident incidents" in occasioning high rates of pay (R. 356, 363).[102] Thus it was that the employers "always found it difficult to get men to turn out for a 6:55 p. m. shape. They not infrequently did not show up at all, or they flatly refused to work at night" (find. 27, R. 604).

B. The 1938 longshore collective agreement was designed to perpetuate the prestatutory wage scheme without change to conform to the statutory requirements.

We cannot leave without comment petitioners' intimation with regard to the collective agreement that it was not artifically created to negate the statutory purpose because its historical structure antedates the Fair Labor Standards Act (Pet. Br., p. 63). It is abundantly clear that what the contracting parties sought to do in the longshore agreements from 1938 on was to perpetuate the prestatutory wage pattern without adjusting their em-

[102] Lester, pp. 186-8, writes of the harmful psychological effects of laboring nights, Sundays and holidays, when others "have off" and of the "harmful physical and social effects that accompany such an unnatural worktime".

ployment relations in any wise to the statutory requirements.

As the Circuit Court observed here: "In the Fall of 1938, after the enactment of the Fair Labor Standards Act", the renewed agreement "changed the labels". What had previously been designated simply as the rate for the hours from 8 a. m. to 12 noon and 1 p. m. to 5 p. m. Monday to Friday, and from 8 a. m. to 12 noon Saturday, was "now called 'straight-time' ". The rates which had previously been fixed "for what the agreements called 'all other time' " were "now called 'overtime', the rates for that period being newly described as 'overtime rates' " Further, "this nomenclature was thereafter used in the agreements and is contained in the agreements for the years involved in these suits. No other significant changes were made in the agreements after the Act went into effect" [162 F. (2d) 665, 666-7; see also find. 33, R. 609].

Additional evidence of the fact that the parties had no intention of attempting to reconcile their contractual program of wage payments with the statutory requirements is seen in the fact that they perpetuated the 44-hour workweek all the way through 1945, notwithstanding the fact that, since October 24, 1940, the Act has prescribed a 40-hour maximum. We have seen, as the only reason offered for this, the stubborn insistence of the employers that the Act's 40-hour standard "was not applicable to the steamship industry".[103] Nor does the position of the shipping companies and the International Longshoremen's Association appear to have been modified in any way following the Administrator's opinion in 1943 (Pl. Ex. 18, R. 559-60) and the adverse holding with regard to the Great Lakes agreements in the same year in a case in which the Union was a party plaintiff. See *I.L.A.*

[103] This brief, p. 27, *supra*.

v. *Natl. Terminals Corp.*, 50 F. Supp. 26 (E. D. Wis. 1943), affd. sub. nom. *Cabunac* v. *Natl. Terminals Corp.*, 139 F. 853 (C. C. A. 7, 1944).

Under the foregoing circumstances, it is apparent that this is not a situation where employers, because of reliance upon prior court decisions or interpretations of the Administrator, have been lulled into unwitting violation of the statute. On the contrary, it is submitted, there is here indicated as transparent an evasion of the statutory requirements as the more elaborate and artful use of a formula whereby "boosted" hours were used as a divisor in obtaining the rate of pay, such as this court held to violate Section 7 in *149 Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199. In his reasoning in the latter case, the Chief Justice has given us a further ground for decision here:

> The payment of "overtime compensation" for non-overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the "overtime" compensation is calculated [331 U. S. 199, 205].

The fact that the change in contractual nomenclature to meet the impact of the Act was here more superficial than artificial is no reason for declining to follow that precedent.

C. Petitioners' statistical surveys were not only irrelevant but subject to defects which deprived them of reliability and weight; the emphasis on portwide peacetime data was designed to conceal systematic discrimination against Negroes by assigning them to undesirable night and weekend work which thus became their normal and usual periods of labor.

We deal here with two related matters suggested by petitioners' line of argument: (1) petitioners' statistical surveys were not only irrelevant but subject to defects which deprived them of reliability and weight; and (2) the

emphasis on portwide peacetime data was designed to conceal systematic discrimination against Negroes by assigning them to undesirable night and weekend work which thus became their normal and usual periods of labor.

1. Since the defense experts relied so completely upon the effect of the statistical surveys to indicate an inhibitory effect of the premium wage payments upon overtime under the longshore agreements, their expert opinion is divorced of all force when the defects in the statistical tables are exposed. The exhibits were designed to show that the pattern of hours worked by longshoremen during the war years and in peacetime, respectively, approached coincidence with the so-called "basic working day" established under the master contract (R. 29-30, 235-6; Def. Exs. D [1923-37], E [1938-9]). To do this the statisticians broke down the total man hours worked by various stevedoring contractors to indicate work at night by those who had previously worked 6-8, 4-less than 6, 2-less than 4, and 0-less than 2 hours, classified as "straight time", respectively, in the same workday. This was what the statistician terms a selection of "course groupings," such as might obscure the true facts. It is not possible to tell from these tables how many employees worked the basic normal 8-hour workday, or whether *any* did. It is at once apparent that the 6-8 hour division contains three "hour-points" as against two for each of the other brackets.

The inference is strong that this departure from standard practice of setting up equal classifications was designed to bolster the impression that 8 hours was normal by "loading" the breakdown in the direction of the top bracket. Every standard work on statistical methods emphasizes that frequency distribution tables should be set up by grouping the items to be posted in classes of equal size. In view of the fact that the contract specifies a

theoretical 8-hour "basic working day", departure from a simple and uniform breakdown indicating those who had worked respectively the unit hours from 1 to 8 in each day, prior to working contractual "overtime", should have been justified by petitioners' statisticians, absent which their presentation is surely suspect (R. 244-5). Failure to include the 8-6, 6-4, 4-2 and 2-0 breakdown in the contemporaneous survey (Def. Ex. J [1944-5]) although the basic data were available (R. 244-5), makes the inference inescapable that its effect would have been unfavorable. The trial court recognized the unreliable character of the result (R. 230-1), yet followed it as a ground of decision (opin. R. 590; find. 29, R. 606-8; find. 39, R. 612).

Among other defects in the tables[104] (1) petitioners were not included in the early survey and for many of the years reports were limited to a very few companies, sometimes but one or two (Def. Ex. D; R. 131-3); (2) the second survey covered only 17 companies, although 47 were embraced in the 1944-5 survey (Def. Exs. E-F, R. 236-7) and no satisfactory explanation of why more than three times as many companies should have been included in the contemporaneous study was ever forthcoming; (3) the latter was based on the selection of but 2 weeks from one month in each quarter of the period of one year covered, or 8 selected weeks out of the 156 weeks or more involved in the period in suit (R. 228-36); (4) three companies included in the earlier surveys were eliminated from the later one (R. 236-7); (5) the surveys were limited to ocean-going shipping and coastwise shipping was excluded without explanation (R. 296); (6) the inference that the

[104] While respondents conceded the accuracy of the "figures" in Defs. Exs. D-F, they questioned their admissibility and certainly did not concede that the methods and procedures used in gathering the data were sound or free from suspicion. And the trial court by no means "found" that Def. Ex. J was accurate or sound. Cf. Pet. Br., pp. 5, note 3, 11-12, 39.

whole project was "loaded" in the direction of the result desired to be shown is borne out by the testimony of its director that in the attempt to get a "proper and more general sample" it was found necessary to bring in *more and more companies* as the study developed (R. 294-5, 308; (7) as to the instructions to the companies in submitting the breakdown of their payrolls to indicate data requested, he conceded that they "could have been drawn more unequivocally" (R. 302).

With all these defects the surveys still indicated between 20% and 28% of the total number of longshore man-hours were consistently outside the basic working day as defined by the agreement between 1923 and 1939, and this increased to 45% in 1944-45 (find. 29, R. 606-8). Even before the war no less than 42% of contractual "overtime" was worked by men who had previously worked no "straight time" hours or fewer than 6 "straight time" hours, and 23% of the night work was worked by men who had previously worked no "straight time" hours during the same day. In 1944-45, night work amounted to 25% of total man hours and work on Saturday afternoon, Sundays and holidays constituted 20% of total man hours; and 44.5% of the night work then was worked by men who had previously worked no "straight time" hours during the same day (find. 29, R. 506-8).

In the light of the above criticism of the tables, it appears clear that even in peacetime over 50% of the overtime hours was worked by men who had not on the same day worked the basic 8 hours referred to in the contract and that there was a consistent group of longshoremen on night shifts who worked no daytime hours at all the same day. The inference is further sustained that the unique character of the hiring device in the industry creates a temporary shift for the day or night, for the duration of the shape, or for the time being for such portion thereof as might be worked on the particular hatch or

ship.[105] Finally, we may point to the contrast with the 1944-45 survey presented by the work pattern of the 20 respondents, which showed 80% "overtime" and only 20% "straight time" (Appendix, this brief), indicating that the defects in the defense surveys have distorted the true picture—at least as it related to these respondents. Here again, respondents' work patterns indicate that the longshore shape may be assimilated to a novel type of temporary shift evidenced particularly by the calling out of crews in gangs as ship and cargo arrivals indicate.[106]

2. Petitioners have said that "there is no question that the work pattern of respondents varied from those of the industry as a whole" (Pet. Br., p. 45), and they have characterized respondents as among a "small number of workers * * * who, because of special circumstances work preponderantly in overtime periods" (Pet. Br., p. 47). They have urged also that, as developed by their portwide statistical surveys, the "preponderance of employees" earned overtime rates only in emergencies (Pet. Br., p. 66) and that "a typical case" such as represented by respondents' work patterns should not govern in determining their "regular rate of pay" here (Pet. Br., p. 46). Further, petitioners have pointed repeatedly to the substantial amount of night work prevailing in the case of some longshoremen such as respondents here as an "aberration" of the war years (Pet. Br., pp. 12, 20, 35, 39, 41, 45, 47, 51, 66).

But we have seen how it came about that Negroes such as respondents were hired in gangs for night work during the war, following the employers' urging that the Union "bring them in and let them work nights" (R.

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[105] Cf. *Night Work in Industry*, pp. 6-8 ff., indicating the variety of types of night shifts in mass production industries, such as rotating, regular fixed, temporary, etc.

[106] See references, this brief, pp. 29, 32-4, *supra*.

176). Thus the Negroes were given the night work, although they would have preferred day work if they could get it. Characteristically it has always been extremely difficult for them to get employment on any shape during the daytime in this industry in the Port of New York.[107]

Obviously, statistical studies and surveys based on peacetime employment experiences or industry-wide work patterns are woefully inadequate criteria with respect to the "regular rate of pay" of respondents who, because of the "cruel accident of birth" (cf. *Steele* v. *Louisville-Nashville R. R. Co.*, 323 U. S. 192, 209), could only get work at night and in fact were specifically hired for this relatively undesirable work.

Furthermore, this Court has repeatedly held that, in view of the statutory language, Section 7's application depends solely upon the duties, employment experience and work pattern of the individual employee and not, as petitioners urge (cf. Pet. Br., p. 47), that of the industry as a whole or even of the particular employer. See *Kirschbaum* v. *Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *McLeod* v. *Threlkeld*, 319 U. S. 491; cf. *Intl. Longshoremen's Assn.* v. *Natl. Terminals Corp.*, 50 F. Supp. 26, 29. Thus, the Administrator's statement of the appropriate test for determining true overtime, as "hours worked outside of the normal or regular working hours" of the individual employee[108] is in substantial accord with this Court's guidance as to the principles under which Section 7 operates.

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[107] See references, this brief, pp. 28-30, 32-3, *supra*.

[108] Cf. this brief, pp. 47-9, *supra*.

CONCLUSION

The judgment of the Second Circuit Court of Appeals should be in all respects affirmed.

Respectfully submitted,

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Analysis of Work Patterns of Plaintiffs

NAME	1 First calendar week employed	2 Last calendar week employed	3 Number of weeks employed	4 Total number of hours worked	5 Total number of straight time hours worked	6 Total number of overtime hours worked	7 No. of weeks worked in which the number of hours worked was more than 40 but less than 60	8 No. of weeks worked in which the number of hours worked was 60 or more	9 Total number of weeks worked	Number of weeks (of those worked) in which the following numbers of days were worked — 1	2	3	4	5	6	7	Number of weeks (of those worked) in which the following numbers of hours were worked — 0-9	10-19	20-29	30-40	41-49	50-59	60 or over	12 Total contested straight time hours	13 Total contested overtime hours
										10											11					
BLUE	10-29-44	8-27-45	47	14	33	6	8	5	67.	5	0	1	2	2	2	2	3	2	0	3	3	1	2	252.	206.
DIXON	4-17-44	10-27-45	80	63	17	37	26	7.5	74.5	4	5	8	19	12	14	1	1	4	11	10	19	8	10	8.	259.5
ELLIOT	5-22-44	8-6-45	64	14	50	8	6	9.	64.	2	1	0	8	1	8	4	1	2	1	2	1	5	2	370.	214.5
FLEETWOOD	3-24-43	4-16-45	108	46	62	22	24	4	73.	13	4	8	12	11	11	2	2	3	4	15	14	6	2	833.5	951.
FULLER	7-8-44	4-16-45	42	15	27	5	10	8	63.	40	3	8	0	3	1	1	1	3	5	1	3	1	1	208.5	230.5
JOHNSON, J.	5-8-44	10-22-45	77	76	1	45	31	5	74.5	6	3	9	20	21	16	1	1	6	7	17	20	14	11	0.	321.0.
MABEE	4-10-44	10-22-45	81	72	9	30	42	3	66.	8	11	14	14	14	11	0	2	12	13	15	11	12	7	0.	259.8.5
SHORT	8-7-44	10-15-45	63	46	17	40	6	9.	66.	1	2	0	5	12	11	15	1	2	0	3	15	13	12	1248.	1009.
STEELE	4-24-44	10-22-45	79	46	33	20	26	8.5	65	5	5	8	15	12	6	6	1	5	9	13	9	10	1	0.	1747.5
TOPPIN	5-1-44	10-22-45	78	74	4	48	26	11.	74.5	2	3	7	19	24	18	1	0	3	8	15	18	19	11	6.5	3312.5
BAY RIDGE																					TOTAL HURON			2926.5	16074.5
AARON	4-2-44	11-26-44	35	11	24	3	8	7.	58.								2	3	1	2	1	2	0	52	99.
ALSTON	1-2-44	12-24-44	52	39	13	19	20	10.	81.								0	4	8	8	3	7	9	318.5	850.
BROOKS	2-13-44	12-3-44	43	14	29	3	11	1.	76.								3	4	3	1	1	1	1	28.	150.5
CARRINGTON	1-2-44	2-10-44	50	35	15	11	24	5.	70.								4	5	6	9	2	5	4	298.5	344.8
GREEN	1-2-44	12-10-44	50	31	20	12	19	2.	73.								2	6	3	8	2	6	4	103.	576.5
HEATH E	1-23-44	9-3-44	33	6	27	1	5	15.	52.								0	2	1	2	0	1	0	44.	8.
JOHNSON A	1-30-44	8-27-44	31	19	12	9	10	6.	76.								1	5	2	2	5	3	1	204.	250.
ROPER	1-23-44	12-24-44	49	40	9	24	16.	19.	76.								0	1	6	9	2	7	15	511.	1158.
STEPHENS	2-13-44	5-21-44	15	5	10	1	4	11.	44.5								0	2	1	1	1	0	0	0.	44.5
TOLBERT	1-16-44	12-24-44	50	46	4	30	16	9.5	85.								1	5	4	6	3	8	19	715.5	1215.5
																					*TOTAL BAY RIDGE			2274.5	4696.5
																					GRAND TOTAL			5201.	20771.

FIGURES NOT AVAILABLE

* Breakdown for the case of the Bay Ridge plaintiffs between straight-time hours and overtime hours is given only for those weeks in which a total of more than 40 hours was worked. Information for shorter weeks is not available.